(12)

No. 95-1723-CFX Title: Tom Grimmett, Trustee for the Bankruptcy Estate of Vincent Siragusa, and Joanne Siragusa, Petitioners
v.
Patricia L. Brown, et al.

Docketed:
April 24, 1996 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Apr 22 1996	Petition for writ of certiorari filed. (Response due May 24, 1996)
	May 8 1996	Waiver of right of respondent Beckley, Singleton, Delanoy, Jemison and List to respond filed.
	May 24 1996	Brief of respondents Patricia Brown, et al. in opposition filed.
	May 29 1996	DISTRIBUTED. June 14, 1996
	Jun 17 1996	Petition GRANTED. SET FOR ARGUMENT January 6, 1997. **********
	Jul 2 1996	Order extending time to file brief of petitioner on the merits until August 16, 1996.
	Aug 14 1996	Motion of National Association of Securities and Commercial Law Attorneys for leave to file a brief as amicus curiae filed.
	Aug 15 1996	Motion of Plaintiffs' Executive Committee, MDL No. 1069, et al. for leave to file a brief as amici curiae filed.
	Aug 16 1996	Joint appendix filed.
	Aug 16 1996	Brief of petitioners Tom Grimmett, et al. filed.
	Aug 30 1996	Record filed.
	Aug 30 1996	Record filed.
	Sep 11 1996	Order extending time to file brief of respondent on the merits until September 30, 1996.
	Sep 16 1996	Order further extending time to file brief of respondent on the merits until October 15, 1996.
	Sep 20 1996	Motion of National Association of Securities and Commercial Law Attorneys for leave to file a brief as amicus curiae GRANTED.
	Sep 20 1996	Motion of Plaintiffs' Executive Committee, MDL No. 1069, et al. for leave to file a brief as amici curiae GRANTED.
	Oct 15 1996	Brief of respondents Patricia L. Brown and Patricia L. Brown, Ltd. filed.
	Oct 15 1996	Brief of respondent Beckley, Singleton, Delanoy, Jemison and List filed.
	Oct 15 1996	Brief amicus curiae of American Honda Motor Company, Inc. filed.
	Oct 15 1996	Brief amicus curiae of National Hockey League filed.
	Nov 18 1996	Reply brief of petitioners Tom Grimmett, et al. filed.
	Nov 20 1996	CIRCULATED.
	Jan 6 1997	ARGUED.
	Jan 14 1997	Writ of certiorari DISMISSED as improvidently granted. Per Curiam.

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FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA

AND

JOANNE SIRAGUSA,

Petitioners,

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., AND BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a civil RICO cause of action accrues when the plaintiff knows or should know that she has been injured – even though she does not know that her injury was caused *by the defendants* – or only when she knows or should know that her injury was caused by the defendants and is part of a pattern of racketeering activity.

2. Whether a cause of action accrues under RICO before the amount of damages, if any, becomes clear and where the injured party may still be made whole by an ongoing bankruptcy proceeding or other suit for damages in another forum.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a-25a) is reported at 75 F.3d 506. The opinion of the United States District Court for the District of Nevada dismissing the complaint (App., *infra*, 26a-34a) is unreported. The opinion of the district court denying petitioners' motion for reconsideration (App., *infra*, 35a-43a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Except as noted, the following statement of facts is taken largely verbatim from the opinion of the court of appeals (App., *infra*, 3a-5a).

1. Vincent and Joanne Siragusa divorced in 1983. At that time, Vincent owned a one-third interest in a cardiology practice called the Heart Institute of Nevada ("HIN"); Drs. Paul Heeren and John Bowers held the remainder equally.[1] As part of the divorce, Joanne agreed

[1] This was not the only organization in which Vincent owned a share. He also owned 33% in the Heart Institute Cath Lab ("HICL") and 27.55% in the Heart Institute Property ("HIP"). These organizations are collectively known as "the medical practices."

to release her one-half community property interest in Vincent's ownership share in the medical practices in exchange for monthly payments. Joanne perfected a security interest in the practices to protect her in the event that Vincent defaulted. When Vincent defaulted in 1987, Joanne secured a state court judgment for the full amount of her interest. Before she could collect her judgment, however, Vincent filed for bankruptcy and claimed that he no longer owned his interest in the practices.

In May 1989, Joanne and Vincent's bankruptcy trustee, Tom Grimmett, filed an adversary complaint in bankruptcy court alleging that Vincent, Dr. Bowers, and Dr. Heeren had conspired to cheat Joanne out of her share in Vincent's interest in the practices.[2] Vincent had claimed that he was forced to sell his interest in the medical practices at a loss and become a mere employee when the practices were reorganized into the Cardiology Associates of Nevada ("CAN"). Joanne alleged that because of secret side agreements, Vincent continued to make as much money as he did before and retained a "sub rosa" interest in the medical practices; to her, the reorganization amounted to a "common plan to defraud

[2] Contrary to the statement of facts in the Ninth Circuit's opinion, the adversary complaint in bankruptcy court clearly did *not* allege that HIN's attorney, Patricia Brown, was involved in the conspiracy to cheat Joanne. Brown's involvement in the conspiracy was not known to petitioners until December 1990 when Dr. Heeren disclosed her role. Until that time, petitioners indulged the reasonable assumption that HIN's attorney was not culpably involved in her client's wrongdoing. Brown and Beckley were added as defendants in the bankruptcy complaint in July 1991.

[her] out of her rights under the Divorce Instruments." The alleged scheme also involved the use of backdated documents and false representations to the bankruptcy court.

In December 1990, Dr. Heeren told Joanne that he, too, had been defrauded by the reorganization scheme. Although Dr. Heeren was also supposed to have received the same share of profits under the side agreements, he had not. Dr. Bowers had used the reorganization scheme not only to cheat Joanne but also to cheat Dr. Heeren and to take control of the medical practices. It was also in 1990 that Dr. Heeren first told Joanne that Patricia Brown (and her law firm, Beckley, Singleton, Delanoy, Jemison & List) had masterminded the scheme.

From April 1991 to November 1991, Dr. Bowers sold 49% of CAN's stock ownership to CAN's doctor-employees. At that time, Dr. Bowers and Brown falsely assured the junior stock-holders that Joanne's 1989 bankruptcy complaint exposed CAN to at most $250,000 in liability. They did not tell the junior stockholders that Joanne also sought to undo the reorganization.[3]

2. In November 1994, Joanne and Grimmett filed a civil RICO action in federal court. They alleged a pattern of racketeering activity having four goals: (1) to acquire and maintain Vincent's medical practice interest by fraud; (2) to acquire and maintain Dr. Heeren's medical practice

[3] In 1992, when Dr. Bowers settled out of court with petitioners, CAN was required to pay substantially all of the $1.4 million settlement payment. Because he settled, Dr. Bowers is not a party in this case.

interest by fraud; (3) to defraud the CAN junior stockholders; and (4) to obstruct justice. They claimed that Brown masterminded the entire scheme.

Brown and her law firm ("Beckley") moved to dismiss the RICO suit as barred by the four-year statute of limitations, claiming that Joanne Siragusa knew of the injury to her interest in Vincent's medical practice in May 1989 (when Joanne filed the bankruptcy court complaint). Brown and Beckley sought to invoke the "injury discovery" rule, under which a civil RICO cause of action accrues once the injury is reasonably apparent.

In response, Joanne and Grimmett argued that although they were aware of Joanne's injury by May 1989, they were not aware that Brown was one of the persons who had caused her injury. They contended that even under the injury discovery rule a cause of action does not accrue until the plaintiff discovers not only that she was injured but also *who caused* her injury. Petitioners also argued that a civil RICO plaintiff's claims do not accrue until she discovers that her injury was part of a pattern of racketeering activity. It was undisputed that under the "pattern discovery" accrual rule followed by several circuits, petitioners' RICO claims did not accrue until at least December 1990, when Dr. Heeren revealed the full scope of the fraudulent reorganization scheme and the fact that he too was victimized by it. Until that time there was clearly no basis for alleging a pattern of racketeering activity (or for charging *respondents* with any wrongdoing).

Petitioners also argued that the doctrine of equitable tolling should apply to delay accrual of the statute of

limitations period because of the closely related action between the same parties in the bankruptcy court, which was still pending there; and that because Brown actively concealed her wrongdoing from petitioners, the doctrine of fraudulent concealment should also toll the running of the limitations period.

3. The district court dismissed the complaint. The court "recognize[d] that when plaintiffs filed their Adversary Proceeding complaint, they may not have been aware, as they allege now, that defendant Brown was involved in any allegedly fraudulent activity. Nevertheless, the rule in this Circuit focuses on when a plaintiff knew or should have known of his injury, and not when that plaintiff knew or should have known that a particular person caused that injury." App., *infra*, 32a. The district court failed to address petitioners' arguments in support of the "pattern discovery" accrual rule, except to note that that was not the accrual rule followed in the Ninth Circuit. The court also did not address petitioners' two equitable tolling arguments.

Petitioners expanded on their argument that the running of the limitations period should be equitably tolled because of the related bankruptcy proceeding in a motion for reconsideration. Petitioners relied upon a line of cases beginning with *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989), which hold that a RICO action does not accrue before the amount of damages, if any, becomes clear and definite. These cases reason that where the injured party may still be made whole by an ongoing bankruptcy proceeding or state court civil suit, the time period for bringing a federal RICO action does not begin to run because there may

ultimately not be any damages. Petitioners contended that because they could still be made whole by the bankruptcy court, the time for bringing a civil RICO action had not yet even begun to run. The district court denied the motion for reconsideration, finding the *Bankers Trust* line of cases unpersuasive. App., *infra*, 35a-45a.

4. The court of appeals affirmed, rejecting each of petitioners' alternative limitations arguments. App., *infra*, 1a-25a.[4] The panel thought that petitioners' criticisms of the "injury discovery" rule were not "persuasive enough to warrant abandonment" of that rule in favor of the "pattern discovery" rule. *Id.* at 12a.[5] The court also rejected petitioners' argument that the statute of limitations had not begun to run because of the possibility they would be made whole in the then ongoing bankruptcy proceeding. The court acknowledged (*id.* at 23a-24a) that if the *Bankers Trust* line of cases were the law in the Ninth Circuit petitioners would prevail. However, the court flatly disagreed with that line of authority. *Id.* at 22a-25a.

The court also rejected petitioners' argument that the limitations period should be equitably tolled by Brown's fraudulent concealment of the bankruptcy scheme and

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[4] The court of appeals ignored petitioners' contention that even under the least generous accrual rule (the "injury discovery" rule followed by the Ninth Circuit), a plaintiff must discover not merely the fact that she has been injured but also who is responsible for that injury. *United States v. Kubrick*, 444 U.S. 111, 122 (1979).

[5] At oral argument, Judge Hall, who wrote the opinion, stated her view that the panel could not adopt the "pattern discovery" rule because only an *en banc* court may overrule circuit precedent.

her role in it. The court held that petitioners never pled the allegedly concealed facts in their complaint and had failed to show Brown's *active* concealment of the reorganization scheme. At most, said the court, Brown failed to "own up" to her illegal conduct. *Id.* at 18a. Although this is a serious distortion of the record, which is loaded with allegations and proof that Brown actively concealed the reorganization scheme,[6] petitioners do not seek review of this issue because it is fact-bound.

REASONS FOR GRANTING THE PETITION

A. This Is An Appropriate Case For Resolving A Long-standing Conflict Among The Circuits On When A Civil RICO Cause Of Action Accrues.

This is an appropriate case for resolving a longstanding and serious conflict in the circuits on the question of when a civil RICO cause of action accrues. The court of appeals observed that, in the absence of guidance from this Court, the circuits have fashioned "no less than three

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[6] As stated in Joanne Siragusa's Reply Brief in the Ninth Circuit at 9-10, Brown committed perjury in depositions on April 9, 1990, November 14, 1990 and November 27, 1990 when she testified that she was not involved in planning or implementing Vincent Siragusa's fraudulent bankruptcy. She also perjured herself in her depositions on November 14, 27 and 28 when she testified that she had not represented Vincent in his divorce or been involved in his divorce proceedings. This perjury, which is detailed in the RICO complaint primarily at Exhibit 4, pages 11-12, hindered petitioners in discovering Brown's criminal role in the bankruptcy and reorganization schemes.

distinct accrual rules for civil RICO claims." App., *infra*, 7a.[7] According to the Ninth Circuit, the circuits are about equally divided between those following the "injury discovery" rule, according to which the limitations period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action,[8] and those following the "pattern discovery" rule, which does not start the statute of limitations clock until the plaintiff discovers or is in a position to discover the existence of a pattern of racketeering activity in addition to the existence and source of his injury.[9]

The Third Circuit follows the "last predicate act" rule, which is the most favorable to plaintiffs. That rule operates like the pattern discovery rule except that the accrual period runs from the time when the plaintiff knew or should have known of the *last injury or last*

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[7] In a recent RICO decision, the Second Circuit identified "a split among the circuits generating as many as half a dozen conflicting accrual rules." *Bingham v. Zolt*, 66 F.3d 553, 559 (2d Cir. 1995), *petitions for cert. pending*, Nos. 95-1245 and 95-1276.

[8] *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-68 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *La Porte Constr. Co. v. Bayshore Nat. Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992).

[9] *Caprioni v. Prudential Securities, Inc.*, 15 F.3d 614, 619 (6th Cir. 1994); *Bath v. Buskhin, Gaims, Gaines & Jonas*, 913 F.2d 817 (10th Cir. 1990); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991); *Granite Falls Bank v. Henrickson*, 924 F.2d 150, 154 (8th Cir. 1991).

predicate act which is part of the same pattern of racketeering activity. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-31 (3d Cir. 1988).

These conflicting accrual rules make an enormous difference in the amount of time a potential RICO plaintiff has to investigate and bring a civil RICO claim – a difference that is frequently outcome dispositive, as in this case. The better reasoned decisions have adopted the pattern discovery rule. These courts recognize that a pattern discovery rule is necessary because a plaintiff often suffers injuries from one or more RICO predicate acts and yet does not have sufficient facts upon which to base a claim that a defendant conducted an enterprise through a pattern of racketeering activity.

Perhaps because of the greater stringency of the critical "continuity" prong of the pattern element after *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), it became evident to many courts that the traditional injury discovery rule did not make sense in the civil RICO context. In cases involving a "closed-ended" scheme, the courts have generally held that the minimum duration necessary to satisfy the continuity requirement is over a year. *See Religious Tech. Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992) (court could find no case in which continuity requirement was held to be satisfied by a pattern of racketeering activity lasting less than a year). By the time a true pattern of racketeering activity could be discovered, much or all of the four year limitations period would have already run, leaving potential plaintiffs with insufficient time to investigate the typically complex facts involved in a RICO case and prepare

a complaint. *Keystone Ins. Co. v. Houghton*, 863 F.2d at 1130.

Accordingly, the courts have increasingly recognized that the four year statute of limitations established in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987) would be vitiated by the application of the normal federal accrual rule based on the discovery of plaintiff's injury. *Keystone Ins. Co. v. Houghton*, 863 F.2d at 1134; *Granite Falls Bank v. Henrikson*, 924 F.2d at 154. Moreover, "[i]n selecting a term of ten years within which predicate acts could occur to establish the pattern requirements, Congress must have contemplated recovery for remote acts and even for remote injuries." *Ibid.*; *Keystone Ins. Co. v. Houghton*, 863 F.2d at 1132-33. The pattern discovery accrual rule is also the only rule consistent with the broad remedial purposes of civil RICO. *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d at 1555; *Keystone Ins. Co. v. Houghton*, 863 F.2d at 1128-29. *See also, Mother of Mercy, Is This The Beginning of RICO?: The Proper Point of Accrual Of A Private Civil RICO Action*, 65 N.Y.U.L. Rev. 172, 205 (1990).

Here, petitioners could not have had knowledge that the injury they suffered was part of a pattern of racketeering activity until December 1990 at the earliest, when Dr. Heeren came forward with the truth of Brown's involvement and revealed that he too had been a victim of a separate but related scheme to fraudulently acquire his medical practice interest.[10] Accordingly, if petitioners

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[10] Petitioners reiterate that until Dr. Heeren's revelation, they did not even know that Brown was culpably involved in the fraudulent reorganization scheme. Thus, they had no basis for suing her or Beckley until that time, quite apart from the need to allege a pattern of racketeering activity.

had initiated a RICO action prior to the discovery of this pattern, they would have been subject to dismissal and possibly sanctions.

Apart from the incorrect decision in this case, the only two Circuits that have, in recent years, declined to adopt a pattern discovery accrual rule are the First and the Seventh. *However, both of those circuits have implicitly acknowledged the force of the arguments in favor of a pattern discovery accrual rule by allowing the RICO limitations period to be equitably tolled during the time that a victim reasonably fails to discover the RICO pattern. Rodriguez v. Banco Corp.*, 917 F.2d 664, 667-68 (1st Cir. 1990); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992). Thus, the difference between the positions of the First and Seventh Circuits on the one hand, and the Third, Sixth, Eighth, Tenth and Eleventh Circuits on the other, may be more theoretical than real.[11]

The Ninth Circuit apparently agreed with that approach when it observed (App., *infra*, 11a) that "a court wishing to give a plaintiff who knows of her injury time

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[11] It is unclear whether the Fourth and Fifth Circuits would still follow the "injury discovery" rule. The precedents in those circuits are ten years old and therefore pre-date this Court's decisions in *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987) and *H.J. Inc.* and the adoption of a pattern discovery rule by other circuits. More recently, a district court within the Fifth Circuit adopted the Third Circuit's "last predicate act" rule. *Crowe v. Smith*, 856 F.Supp. 1178, 1181-85 (W.D. La. 1994).

to investigate the pattern can always toll the limitations period," citing *McCool*, 972 F.2d at 1465. Inexplicably, however, the Ninth Circuit did not remand the case to the district court with a direction to consider whether the limitations period should be tolled; nor did the court suggest any reason why the limitations period should not be tolled in this case.

In other respects as well, the Ninth Circuit panel's defense of the "injury discovery" rule is weak and even incoherent. After settling forth petitioners' basic argument in favor of the pattern discovery rule, the court acknowledges that their "exposition of the law is correct." *Id.* at 12a. However, the court then purports to refute petitioners' argument with the following statement (*ibid.*):

> Because a RICO cause of action cannot accrue until all the elements exist, *see McCool*, 972 F.2d at 1465, no statute of limitations can begin to tick until a pattern exists, which will not be until continuity exists and the one year usually required to establish continuity has already lapsed. Because this one-year delay impacts both rules equally, it favors neither.

We have read this critical passage many times but its meaning is still not clear to us. Our best guess is that the court is drawing a distinction between the *existence* of a pattern of racketeering activity and the plaintiff's *discovery* of that pattern. The court seems to be saying that even under its interpretation of the injury discovery rule "no statute of limitations can begin to tick until a pattern exists" (*ibid.*). The only difference between the two rules, then, is that under the Ninth Circuit's rule the clock

begins to tick as soon as a pattern actually exists (even if its existence could not be discovered by the plaintiff until much later), whereas under the "pattern discovery" rule the limitations period does not commence until the plaintiff discovers or should have discovered the existence of the pattern of racketeering activity.

If that is what the Ninth Circuit means, its position makes no sense. Why should the limitations period begin to run as soon as a pattern *exists* if the plaintiff had no means to *discover* that it existed? No other court has suggested that under the "injury discovery" rule the clock does not begin to run until a pattern of racketeering activity exists; thus, the Ninth Circuit's apparent position is *sui generis*. Moreover, the court fails to explain why a remand is not necessary to determine when a pattern of racketeering activity came into existence in the case at bar. The district court never made such a finding because it believed that under the injury discovery rule the clock begins to run when a plaintiff discovers her injury, regardless of when a pattern existed. Indeed, the parties never argued the mixed factual and legal question of when a pattern of racketeering activity first existed (as opposed to when petitioners discovered its existence) because they did not believe it to be relevant.

B. The Ninth Circuit Also Rejected The Well-Reasoned Position Of Three Other Circuits That A Cause Of Action Does Not Accrue Under RICO Before The Amount Of Damages, If Any, Becomes Clear, Where The Injured Party May Still Be Made Whole By An Ongoing Damage Suit In Another Forum.

If the foregoing RICO accrual issue was the only one in the case, there would be reason enough to grant

review. But there is another important accrual issue in the case, which the Ninth Circuit also decided incorrectly. The Ninth Circuit acknowledged that the First, Second and Seventh Circuits have held that a RICO plaintiff's cause of action does not accrue while she is pursuing a single damage remedy in another forum that may yet make her whole. App., *infra*, 22a-23a , citing *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105-06 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989) (plaintiff's RICO cause of action had not yet accrued where, at time of RICO suit, it was still attempting to regain some of the defendant's fraudulently concealed assets in an ongoing bankruptcy proceeding so that the amount of plaintiff's damages, if any, remained speculative); *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1165 (2d Cir.), *cert. denied*, 114 S.Ct. 385 (1993) (RICO claim had not accrued for a plaintiff who, because he had not collected on judgments awarded in earlier state proceedings, did not know the amount of his damages); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 728 (1995) ("[A]s a general rule, a cause of action does not accrue under RICO until the amount of damages becomes clear and definite."); *Barnett v. Stern*, 909 F.2d 973, 977 n.4 (7th Cir. 1990) (adopting *Bankers Trust* rule on similar facts); *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 847-48 (1st Cir. 1990) (adopting *Bankers Trust* rule for RICO claim where plaintiff has yet to win or collect judgment on state court action for his injury).

The reason for that rule is obvious: if a potential plaintiff is made whole by means of a bankruptcy action or state court judgment she would then have suffered no damages. So long as the existence of damages remains

speculative, a cause of action should not accrue. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971).

The Ninth Circuit, like the district court, recognized that this case has facts virtually identical to *Bankers Trust*. However, like the district court, it chose to reject the *Bankers Trust* rule. Here again, the court justified its decision largely on the basis of prior Ninth Circuit precedent. The court did not criticize the *Bankers Trust* rule on policy grounds. It merely said that the rule was not compelled by this Court's decision in *Zenith*, *supra*, because *Zenith* dealt with lost future profits which could not yet be calculated.

> In *Bankers Trust*, however, the RICO plaintiff had sustained a definable injury – the uncertainty in that case involved whether and to what extent the known injury would be mitigated by a bankruptcy court. In one, the injury is speculative because it is not known whether it will occur at all; in the other, the injury has occurred and is known, but it is speculative whether the damages might be reduced *or even eliminated* by alternative recovery efforts. We believe it would be error to equate the two.

Id. at 24a (emphasis supplied). While petitioners would concede that the *Bankers Trust* rule is not compelled by this Court's decision in *Zenith*, neither is it precluded by *Zenith* or any other decision of the Court. The Ninth Circuit apparently saw no need to justify its rejection of the *Bankers Trust* rule – a rule followed by three circuits and heretofore rejected by none – because it deemed itself bound by prior Ninth Circuit precedent. However, the

Ninth Circuit cases it relied on did not even address this precise issue.

Petitioners urged the Ninth Circuit not to adopt a rule contrary to *Bankers Trust* that would force defrauded creditors and bankruptcy trustees to resort to treble damage RICO suits in federal court at the earliest possible time instead of encouraging them to first seek a more limited and less complicated single damage remedy in bankruptcy or state court. Petitioners argued that there was nothing to be gained by forcing plaintiffs to prematurely escalate their litigation posture into a RICO suit and much to be lost, including a good measure of judicial economy. We submit that the Ninth Circuit failed to address these arguments because there is no sound reason for rejecting the *Bankers Trust* line of cases.

The RICO accrual issues in this case are ripe for review. This case offers the Court an opportunity to resolve at one time the two most important civil RICO accrual issues that have divided the circuits. The Court's resolution of these issues may also significantly affect non-RICO cases. In particular, the Court could decide whether a cause of action may accrue even before a plaintiff discovers who caused her injury, as the Ninth Circuit holds, *Gibson v. United States*, 781 F.2d 1334, 1344 (9th Cir. 1986); App., *infra*, 31a-32a, or whether, as this Court stated in *United States v. Kubrick*, 444 U.S. 111, 122 (1979), a plaintiff must be in "possession of the critical facts that he has been hurt *and who has inflicted the injury*" before the cause of action arises. *Accord Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d at 1554-55 ("a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should

have discovered, both the existence *and source* of his injury and that the injury is part of a pattern.") (emphasis added). A ruling for petitioners on that broader issue would provide an alternative ground for reversing the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1996

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOM GRIMMETT, As Trustee for the Bankruptcy Estate of Vincent Siragusa,

Plaintiff,

and

JOANNE SIRAGUSA,

Plaintiff-Appellant,

v.

PATRICIA L. BROWN; PATRICIA L. BROWN, LTD., A Nevada Corporation; BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHARTERED, A Nevada Corporation,

Defendants-Appellees.

No. 94-16137

D.C. No. CV-93-01155-PMP

TOM GRIMMETT, As Trustee for the Bankruptcy Estate of Vincent Siragusa,

Plaintiff-Appellant,

v.

PATRICIA L. BROWN; PATRICIA L. BROWN, LTD., A Nevada Corporation; BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHARTERED, A Nevada Corporation,

Defendants-Appellees.

No. 94-16214

D.C. No. CV-93-01155-PMP

OPINION

Appeals from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted
December 6, 1995 – San Francisco, California

Filed January 26, 1996

Before: James R. Browning, William C. Canby, Jr., and Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Hall

COUNSEL

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Don F. Shreve, Jr., and Peter Angulo, Rawlings, Olson & Cannon, Las Vegas, Nevada, for defendants-appellees Brown.

George W. Foley, Jr., Pearson and Patton, Las Vegas, Nevada, for defendant-appellee Beckley, Singleton.

OPINION

HALL, Circuit Judge:

Joanne Siragusa and Tom Grimmett, the bankruptcy trustee of Joanne's ex-husband Vincent's estate, appeal the district court's dismissal of their civil RICO suit. In their November 1994 suit, Joanne and Grimmett alleged

that defendant Patricia Brown masterminded the reorganization of Vincent's medical practices so as to cheat Joanne out of her post-divorce community property interest in those practices. The district court found their suit barred by RICO's four-year statute of limitations. On appeal, Joanne and Grimmett argue: (1) that the district court applied the wrong accrual rule to their RICO cause of action; (2) that it wrongly concluded that their post-November 1990 injuries did not trigger the "separate accrual rule;" (3) that it failed to address whether their RICO cause of action was tolled by Brown's fraudulent concealment; and (4) that it wrongly held that the pendency of the bankruptcy proceeding did not toll the statute or prevent the RICO cause of action from accruing.

The district court had jurisdiction over the RICO claim under 18 U.S.C. § 1964(c). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I.

Vincent and Joanne Siragusa divorced in 1983. At that time, Vincent owned a one-third interest in a cardiology practice called the Heart Institute of Nevada ("HIN"); Drs. Paul Hareen and John Bowers held the remainder equally.[1] As part of the divorce, Joanne agreed to release her one-half community property interest in Vincent's ownership share in the medical practices in

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[1] This was not the only organization in which Vincent owned a share. He also owned 33% in the Heart Institute Cath Lab ("HICL") and 27.55% in the Heart Institute Property ("HIP"). These organizations are collectively known as "the medical practices."

exchange for monthly payments. Joanne perfected a security interest in the practices to protect her in the event that Vincent defaulted. When Vincent defaulted in 1987, Joanne secured a state court judgment for the full amount of her interest. Before she could collect her judgment, however, Vincent filed for bankruptcy and claimed that he no longer owned his interest in the practices.

In May 1989, Joanne and Vincent's bankruptcy trustee, Tom Grimmett, filed an adversary complaint in bankruptcy court alleging that Vincent, Dr. Bowers, Dr. Hareen, and HIN's attorney, Patricia Brown, had conspired to cheat Joanne out of her share in Vincent's interest in the practices. Vincent had claimed that he was forced to sell his interest in the medical practices at a loss and become a mere employee when the practices were reorganized into the Cardiology Associates of Nevada ("CAN"). Joanne alleged that because of secret side agreements, Vincent continued to make as much money as he did before; to her, the reorganization amounted to a "common plan to defraud [her] out of her rights under the Divorce Instruments." The alleged scheme also involved the use of backdated documents and false representations to the bankruptcy court.

In December 1990, Dr. Hareen told Joanne that he, too, had been defrauded by the reorganization scheme. Although Dr. Hareen was supposed to have received a share of profits under the side agreements, he had not. It was also in 1990 that Dr. Hareen first told Joanne that Patricia Brown (and her law firm, Beckley, Singleton, Delanoy, Jemison & List) had masterminded the scheme.

From April 1991 to November 1991, Dr. Bowers sold 37.5% of CAN's stock ownership to CAN's doctor-employees. At that time, Dr. Bowers assured the junior stockholders that Joanne's 1989 bankruptcy complaint exposed CAN to at most $250,000 in liability. Dr. Bowers did not tell the junior stockholders that Joanne also sought to undo the reorganization.

In November 1994, Joanne and Grimmett filed a civil RICO action in federal court.[2] They alleged a pattern of racketeering activity having four goals: (1) to acquire and maintain Vincent's medical practice interest by fraud; (2) to acquire and maintain Dr. Hareen's medical practice interest by fraud; (3) to defraud the CAN junior stockholders; and (4) to obstruct justice. They claimed that Brown masterminded the entire scheme.

Brown and her law firm moved to dismiss Siragusa's RICO suit as barred by the four-year statute of limitations, claiming that Siragusa knew of the injury to her interest in Vincent's medical practice in May 1989 (when Siragusa filed the bankruptcy court complaint). Brown sought to invoke the "injury discovery" rule, under which a civil RICO cause of action accrues once the injury is reasonably apparent; under this theory, Siragusa's claim would be time-barred. In response, Siragusa claimed that the "injury and pattern discovery" rule applied, and that she did not discover the "pattern" of racketeering activity until December 1990 when Dr. Hareen disclosed the scope of Brown's activities. Siragusa

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[2] Since both plaintiffs filed identical briefs to this court, both will be hereafter referred to as "Siragusa."

argued in the alternative that she had suffered new injuries since November 1990 which, under the separate accrual rule, allowed her to press her claim. The district court dismissed the suit.

Siragusa moved for reconsideration on the ground that the bankruptcy proceeding had equitably tolled her RICO cause of action. She further contended that Brown's fraudulent concealment of the conspiracy tolled the limitations period. The district court addressed only the first argument and denied Siragusa's motion. Siragusa's timely appeal followed.

II.

Siragusa first argues that her civil RICO cause of action did not accrue until December 1990, when she first discovered the "pattern" of Brown's conspiracy; because the statute of limitations for a civil RICO claim is four years, *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987), she claims that her November 1994 action was timely and that the district court erred in dismissing her suit.

We review de novo the district court's dismissal on statute of limitations grounds. *Washington v. Garrett*, 10 F.3d 1421, 1428 (9th Cir. 1993). Because the district court has in this case considered evidence outside the pleadings, we treat Brown's motion as one for summary judgment. *See* Fed. R. Civ. P. 12(c). Thus, we must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly

applied the relevant substantive law. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

The elements of a civil RICO claim are simple enough: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as "predicate acts") (5) causing injury to the plaintiff's "business or property." 18 U.S.C. §§ 1964(c), 1962(c); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). In the absence of guidance from the Supreme Court,[3] however, the Courts of Appeals have fashioned no less than three distinct accrual rules for civil RICO claims. The issue of which one to apply is a question of law we review de novo. *Mendez v. Ishikawajima-Harima Heavy Indus. Co.*, 52 F.3d 799, 800 (9th Cir. 1995).

The first rule, followed by the First, Second, Fourth, Fifth, and Seventh Circuits, is the "injury discovery" rule. This rule was imported from the general federal rule of accrual and has two components. First, the civil RICO limitations period "begins to run when a plaintiff knows or should know of the injury that underlies his cause of action." *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *see Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-68 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *La Porte Constr. Co. v. Bayshore Nat. Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992). The plaintiff need not discover that the injury is part of a "pattern of racketeering" for the period to begin

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[3] *Malley-Duff* did not reach this issue. 483 U.S. at 156-57.

to run. *McCool*, 972 F.2d at 1465. The second part of the "injury discovery" rule is the "separate accrual rule," which provides that a new cause of action accrues for each new and independent injury, even if the RICO violation causing the injury happened more than four years before. *Bankers Trust*, 859 F.2d at 1103.

The second accrual rule, followed by the Sixth, Eighth, Tenth, and Eleventh Circuits, is the "injury and pattern discovery" rule. Under this rule, the plaintiff must "discover, or be in a position to discover, the existence of a pattern of racketeering activity *in addition to* the existence . . . of the injury." *Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619-20 (6th Cir. 1994) (emphasis added) (footnote omitted); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Garden Office Bldg. v. Barnette Bank*, 906 F.2d 1546, 1554 (11th Cir. 1990), *cert. denied sub nom. Barnette Banks, Inc. v. Konstand*, 500 U.S. 910 (1991). These Circuits also follow the "separate accrual rule" so that the limitations period begins to run as to each new and independent injury when the plaintiff discovers both the injury and the pattern. *Bivens*, 906 F.2d at 1554-55.

The Third Circuit follows the final rule, the "last predicate act" rule. This rule provides that:

> [T]he limitations period for a civil RICO claim runs from the date the plaintiff knew or should have known that the elements of a civil RICO cause of action existed, *unless*, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or *further predicate acts occur which are part of the same pattern. In that*

> *case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity.* The last predicate act need not have resulted in injury to the plaintiff but must be part of the same "pattern."

Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1126 (3d Cir. 1988) (emphasis added).

While Siragusa concedes that she knew of her injury – the loss of her interest in Vincent's medical practice – by the time she filed her May 1989 bankruptcy complaint, she claims that she did not learn of Brown's pattern of activity until December 1990, when Dr. Hareen came forward and she learned that Brown's scheme targeted more than one victim. Because, she claims, the Ninth Circuit currently follows the "injury and pattern discovery" rule, she had until December 1994 to bring her civil RICO claim.

Unfortunately for Siragusa, we have faithfully followed the "injury discovery" rule for over a decade. *See Stitt v. Williams*, 919 F.2d 516, 525 (9th Cir. 1990) ("The limitations period [for civil RICO actions] begins to run when a plaintiff knows or should know of the injury which is the basis for the action."); *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988) (holding that civil RICO claim accrues "when [the plaintiff has] actual or constructive knowledge of the fraud."); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1415 (9th Cir. 1987) ("The limitations period begins to run when a plaintiff knows or should know of the injury which is the basis for the action."); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984) (reasoning that the general rule for accrual,

plaintiff's discovery of the injury, should apply to civil RICO claims). This Circuit has also adopted the separate accrual rule. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring).

Siragusa nonetheless asks us to reconsider our prior holdings in light of the recent advent of the "injury and pattern discovery" rule, and urges us to adopt this newer rule.[4] She initially points out that RICO should be read broadly, *Sedima*, 473 U.S. at 497, and argues that the "injury and pattern discovery" rule comports with this broad reading.

Siragusa then levels three criticisms at the "injury discovery" rule, contending the rule is inconsistent with a broad reading of RICO. First, she claims that this rule has the wrong focus: Instead of focusing on the injury caused by the RICO *violation* (which requires a pattern), this rule – because it does not require discovery of a pattern – focuses solely on the injury caused by the *predicate act*. *See Granite Falls*, 924 F.2d at 154. This argument has merit, however, only if the focus of RICO *is* on the RICO violation and not on the predicate acts. RICO focuses on the predicate acts. *See Sedima*, 473 U.S. at 497 ("[T]he essence of the [RICO] violation is the commission of those [predicate] acts in connection with the conduct of an enterprise . . . . Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the *commission of the predicate acts.*") (emphasis added).

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[4] Siragusa does not argue that the panel should adopt the "last predicate act" rule.

Siragusa next contends that the "injury discovery" rule, because it does not require a plaintiff to discover a pattern, is unfair to that plaintiff because it starts the clock ticking before she discovers all the elements of her claim. This argument rests on the assumption that a plaintiff's cause of action should not accrue until she has discovered that all elements exist. This is wrong. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (holding that Clayton Act statute of limitations period begins to run when plaintiff is injured); *United States v. Kubrick*, 444 U.S. 111, 123 (1979) (holding that the Federal Torts Claim Act statute of limitations period begins when a plaintiff discovers his injury and not when he also discovers it was negligently inflicted). Besides, a court wishing to give a plaintiff who knows of her injury time to investigate the pattern can always toll the limitations period. *See McCool*, 972 F.2d at 1465.

Siragusa finally argues that the "injury discovery" rule does not give a plaintiff sufficient time to bring suit. To prove a "pattern," she argues, a plaintiff must show (1) two predicate acts within 10 years of each other; (2) a relationship between those two acts; and (3) a threat of continued activity. See 18 U.S.C. § 1961(5); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Although a plaintiff can prove a relationship by showing that the acts "have the same or similar purposes, results, participants, victims, or methods of commission," *id.* at 240 (citing 18 U.S.C. § 3575(e)), continuity cannot usually be proven unless the scheme has been in existence for at least one year. *Religious Technology Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992). Because the continuity

element requires at least one year to mature, she concludes, only three years remain to bring suit. While Siragusa's exposition of the law is correct, it does not advance her argument to favor the "injury and pattern discovery" rule. Because a RICO cause of action cannot accrue until all the elements exist, *see McCool*, 972 F.2d at 1465, no statute of limitations can begin to tick until a pattern exists, which will not be until continuity exists and the one year usually required to establish continuity has already lapsed. Both accrual rules at issue here require all the elements to exist; neither will begin to tick until the one-year continuity delay has lapsed. Because this one-year delay impacts both rules equally, it favors neither.

We do not find Siragusa's criticisms persuasive enough to warrant abandonment of the "injury discovery" rule. Moreover, the "injury discovery" rule encourages diligence in RICO prosecutions and insures that evidence remains fresh. For these reasons, we reaffirm this Circuit's rule that a civil RICO cause of action arises when the plaintiff knows or should know that she has been injured.

Under this rule, the dismissal of Siragusa's RICO claim is proper. In her May 1989 complaint in bankruptcy court, Siragusa alleged that a "common plan . . . defrauded [her] out of her rights under the Divorce Instrument [i.e., her half of Vincent's medical practice interest]." Given these allegations, it is clear that Siragusa knew in May 1989 that she had suffered injury. Thus, she had until May 1993 to file her claim; because it was filed thereafter, it was properly dismissed.

III.

Siragusa next claims that, even if the injury she discovered in May 1989 is barred by the statute of limitations, she has since suffered other injuries which, under the "separate accrual rule," entitle her to recover for all her injuries.

In his concurrence in *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987), then-Judge Kennedy first applied the "separate accrual rule" in the RICO context:

> The rule is that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and other acts were committed outside the limitations period. A corollary rule is that damages may not be recovered for injuries sustained as a result of acts committed outside the limitations period.

Id. (citations omitted). For support, Judge Kennedy drew on *Gibson v. United States*, 781 F.2d 1334, 1340 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) (applying rule and its corollary in a § 1983 conspiracy case) and *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299, 1301-02 (9th Cir.), *cert. denied*, 479 U.S. 886 (1986) (applying rule and its corollary in a Sherman Act case and holding that plaintiff, a souvenir store owner, suffered new injury each time the defendant tour company shepherded tourists to its coconspirators, other souvenir shops, to drive the plaintiff out of business).

Only a few Ninth Circuit cases offer guidance for a court applying this rule. Prior to *Ammann*, the court had

rarely discussed what constituted a "new" injury. In *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68 (9th Cir.), *cert. denied sub nom. AMF, Inc. v. General Motors Corp.*, 444 U.S. 900 (1979), the plaintiff, AMF, accused car manufacturers of violating the Clayton Act because they all agreed not to purchase AMF's engine emission control devices. By 1964, every defendant had refused to buy AMF's device. When AMF's 1969 suit was dismissed for exceeding the four-year limitations period, AMF claimed it suffered a new injury because one of the car companies had refused AMF's renewed offer to deal in 1965. The court held that AMF had been excluded from the device market (and injured) in 1964 when the car manufacturers gave their "irrevocable, immutable, permanent, and final" decision; a subsequent refusal did not create a new injury. *Id.* at 72.

In *Pace Industries, Inc. v. Three Phoenix Co.*, 813 F.2d 234 (9th Cir. 1987), the Circuit drew on *Hennegan* and *Air Pollution* to further define *Ammann's* "overt act" language. It held that:

> [T]wo elements characterize an overt act which will restart the statute of limitations: 1) It must be a *new and independent act* that is not merely a reaffirmation of a previous act; and 2) It must *inflict new and accumulating injury* on the plaintiff.

Pace, 813 F.2d at 238. In *Pace*, the plaintiff Pace entered into a contract to purchase Wabash's line of multiple disc testers. The contract contained a covenant wherein Pace agreed not to compete with Three Phoenix, the company to which Wabash had sold its line of single disc testers. When Pace disregarded this agreement in 1978 and began

to market single disc testers, Three Phoenix sued for injunctive relief in state court; the case was appealed to the Arizona Supreme Court. In 1983, Pace instituted its RICO suit claiming that the Wabash-Pace agreement was part of a scheme between Wabash and Phoenix to keep Pace out of the single disc business, in violation of antitrust law. When Pace's suit was dismissed as untimely, Pace contended that Three Phoenix's filing of appeals within the four year period was an "overt act" designed to further its scheme. We disagreed, holding that Three Phoenix's appeal was not a new and independent act apart from its initial filing of the suit in 1975.

Other Circuits also use the "new and independent" language in their "separate accrual" rules, which shed additional light on how this term is interpreted. In *Bivens*, the defendants were accused of committing three sets of acts: (1) a wrongful takeover of a limited partnership in 1975; (2) the mismanagement and diversion of the partnership's assets from 1975 to 1981; and (3) the sale of the partnership's primary asset, a hotel, at below fair market value in 1981. 906 F.2d at 1549-51. The Eleventh Circuit held that the mismanagement and subsequent sale of the hotel were "new and independent" acts because they "[were] not included among the injuries that naturally flow from the wrongful takeover [in 1975]." *Id.* at 1551. In *Bankers Trust*, the corporate defendant was accused of: (1) wrongfully concealing assets during a 1974-76 bankruptcy proceeding; (2) conducting harassing lawsuits in 1978-79 to prevent the plaintiff from vacating the fraudulently attained bankruptcy plan; and (3) fraudulently conveying property in 1981. The court adopted the separate accrual rule and found that the final two injuries were

"independent" of the first. *Bankers Trust*, 859 F.2d at 1102-05.

Siragusa's primary injury is the loss of her interest in Vincent's medical practice. Because this injury appears to have been perfected upon the reorganization of the medical practices and the filing of Vincent's bankruptcy petition, it seems to have been concluded by May 1989 at the latest (when Siragusa actually knew of the injury); because that is more than four years before the filing of her November 1994 complaint, that injury would seem to be unreachable under *Ammann's* corollary rule.

Siragusa argues that this particular injury has still not been perfected – because the bankruptcy proceeding aimed at defeating her interest is not yet completed. Even if we assume that this argument has merit (which is doubtful), Siragusa fails to show any "new and independent" act inflicting a "new" injury since November 1990. In her complaint, Siragusa claims that Brown engaged in four sets of post-November 1990 acts that injured her: (1) mail fraud by submitting false documents to the Bankruptcy Court to conceal the fraud; (2) obstruction of justice by concealing documents and falsely testifying in depositions; (3) defrauding Dr. Hareen; and (4) defrauding CAN junior owners by not disclosing CAN's full liability to Siragusa. As to each of these, Siragusa claims that she has been injured due to a loss in her share of the profits from Vincent's medical practice interest.

None of the post-November 1990 acts listed above are "new and independent." To begin with, all of them

are part of the same corporate reorganization/bankruptcy scheme, and the injuries Siragusa claims are identical to those alleged prior to that time – the loss of her interest in Vincent's practice; neither the acts nor the injuries are new. These injuries are far less independent from one another than were the wrongful takeover and mismanagement of assets in *Bivens* or the false bankruptcy claim and harassing litigation in *Bankers Trust*. And although the injury may be different as to the CAN junior owners or even Dr. Hareen, Siragusa cannot claim that *their* injuries are new injuries to *her;* a RICO claim only redresses the plaintiff's injuries. *See* 18 U.S.C. § 1964(c) ("Any person injured in *his* business or property . . . may sue therefor . . . ") (emphasis added); *Pace*, 813 F.2d at 238 (holding that the statute of limitations will restart only if plaintiff shows a "new and accumulating injury *on the plaintiff*") (emphasis added). Siragusa's post-November 1990 injuries cannot therefore form the basis for a separate cause of action.

IV.

Siragusa argues that the statute of limitations on her RICO cause of action should have been tolled until December 1990, when she first learned that her injuries were part of a pattern of racketeering activity. Until that point, she contends, Brown had perjured herself in depositions and other correspondence to insure that Siragusa never learned of the pattern. Equitable tolling doctrines, including fraudulent concealment, apply in civil RICO cases. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1199 (9th Cir. 1988) ("As to the RICO claim . . . federal equitable tolling doctrines apply."); *see Volk*, 816 F.2d at 1415.

As an initial matter, Siragusa never pled the allegedly concealed facts in her complaint. Failure to plead these facts waives this tolling defense. *See Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 120 (9th Cir. 1980) ("The plaintiff must plead with particularity the circumstances surrounding the fraudulent concealment and state facts showing his due diligence in trying to uncover the facts." (citation and internal quotation omitted)); *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (failure to plead facts with particularity requires dismissal).

Siragusa's tolling arguments lose on the merits as well. The doctrine of fraudulent concealment is invoked only if the plaintiff both pleads and proves that the defendant *actively* misled her, and that she had neither actual nor constructive knowledge of the *facts constituting her cause of action* despite her due diligence. *Volk*, 816 F.2d at 1415 ("The doctrine [of fraudulent concealment] is properly invoked only if a plaintiff establishes 'affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief.' ") (citation omitted); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir. 1978); *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 120 (9th Cir. 1980); *Pocahontas*, 828 F.2d at 218-19 (noting that fraudulent concealment "implies conduct more affirmatively directed at deflecting litigation ") (emphasis added).

Siragusa's claim fails to demonstrate active concealment. She sets forth no proof of Brown's active concealment of the reorganization scheme; at most, Brown failed to "own up" to her illegal conduct. A failure to "own up" does not constitute active concealment. *Pocahontas*, 828

F.2d at 218. Furthermore, Siragusa had available all the facts necessary to discover her cause of action with due diligence. The limitations period does not toll simply because a party is ignorant of her cause of action. *Volk*, 816 F.2d at 1416; *Pocahontas*, 828 F.2d at 218.

Thus, the district court did not err when it failed to consider this meritless argument.

V.

Siragusa argues that Vincent's ongoing bankruptcy proceeding makes her RICO claim timely. She first argues that, even if her RICO cause of action accrued in May 1989, it was automatically tolled by the bankruptcy proceeding. Alternatively, she argues that her RICO action has not yet accrued because she does not yet know her damages.

A.

In her first argument, Siragusa relies on *Mt. Hood Stages Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980). In *Mt. Hood*, the Interstate Commerce Commission (ICC) permitted Greyhound to acquire a number of bus companies whose routes circled Mt. Hood on the condition that Greyhound not interfere with bus routes going through the mountain. Greyhound started to violate the condition, and one of its competitors, Mt. Hood Stages, filed a complaint with the ICC in 1964. When Mt. Hood Stages sued for antitrust violations in 1968, Greyhound moved to dismiss because the four-year limitations period had started to run in 1960. Mt.

Hood Stages contended that the ICC proceeding tolled the limitations period, and the court agreed. We reasoned that Greyhound would be immune from antitrust liability if its challenged transportation practices were necessary to effectuate the acquisitions approved by the ICC. The necessity of the practices could only be decided by the ICC as an expert body. Thus it was appropriate to toll the running of limitations on the antitrust claim until the ICC had made "a preliminary determination of issues within its primary jurisdiction." *Id.* at 405.

Subsequent cases have read *Mt. Hood* narrowly and limited its application to cases involving "considerations of federal policy and primary jurisdiction." *Pace*, 813 F.2d at 241; *Community Elec. Serv. v. National Elec. Contractors Ass'n, Inc.*, 869 F.2d 1235, 1241 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989). In *Conley v. International Brotherhood of Elec. Workers*, 810 F.2d 913 (9th Cir. 1987), the plaintiff filed a petition with the National Labor Relations Board and then brought a court action stating similar claims of unfair labor practices, violations of the Labor-Management Relations Act, and violations of state law. The court read *Mt. Hood* to say that "[e]quitable tolling is most appropriate when the plaintiff is required to avail himself of an alternative course of action as a precondition to filing suit." *Id.* at 915. In that case, the NLRB suit was merely a "parallel avenue[ ] of relief" to the court action. *Id.* at 916. Thus, we refused to toll the period while the NLRB had considered the plaintiff's petition. *See also Community Electric*, 869 F.2d at 1241 (refusing to toll statute of limitations for period in which plaintiff sought relief from NLRB because prior resort to the NLRB "was not a prerequisite to review in federal court"); *Pace*, 813

F.2d at 240 ("Prior judicial actions, however, 'do not toll the statute of limitations, no matter how close their relationship to the one at bar.' ") (citation omitted).

Given this interpretation of *Mt. Hood*, Siragusa's claim fails. Unlike the ICC's jurisdiction over immunity claims, the primary jurisdiction of the bankruptcy court is not RICO claims. With respect to RICO claims, the bankruptcy court and federal court are more properly considered "parallel avenues of relief." Even if Siragusa could have raised her RICO claim in some form in the bankruptcy proceeding, *see In re The Monetary Group*, 2 F.3d 1098, 1099 (11th Cir. 1993), she could have simultaneously pressed her claim in federal court since the automatic stay did not apply to her claim against Brown, who was not the debtor, *see* 11 U.S.C. § 362(a); *In re Kalispell Feed & Grain Supply*, 55 B.R. 627, 629 (Bankr. D. Mont. 1985). Thus, the bankruptcy proceeding did not toll her RICO claim.

B.

Siragusa's alternative argument requires more consideration. She argues that the conclusion of the bankruptcy proceeding *is* a prerequisite to her RICO claim. Because the bankruptcy court may award her all her damages and thereby remove all her injury, she has not yet definitively suffered injury and therefore lacks an element of her RICO cause of action. Thus, she argues, her claim has not yet accrued and could not be barred by the statute of limitations.

The seed of this discussion is a 1971 Supreme Court case, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S.

321 (1971). In that case, Zenith sued Hazeltine for Sherman and Clayton Act violations arising from Hazeltine's participation in Canadian, English, and Australian patent pools. Zenith sought future damages to its market share due to Hazeltine's wrongful behavior. The Court applied the separate accrual rule to each of Zenith's injuries, and noted that in most cases, future damages could be awarded. It also observed that "it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." *Id.* at 339. The Court concluded that the cause of action for future lost profits would accrue as those damages were incurred: "In antitrust and treble-damages actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered." *Id.*

A line of cases in the Second Circuit has seized on this language and construed it broadly. In *Bankers Trust*, the Circuit held that a RICO plaintiff's cause of action had not yet accrued. At the time of the federal suit, the plaintiff was attempting to regain some of the defendant's assets in an ongoing bankruptcy proceeding. The court noted that the plaintiff might recover all his damages in the ongoing bankruptcy proceeding, so that the amount of the plaintiff's damages was speculative. Relying on *Zenith*, it concluded that his RICO cause of action had not yet accrued. *Bankers Trust*, 859 F.2d at 1105-06. *See also Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1165 (2d Cir.), *cert. denied*, 114 S.Ct. 385 (1993) (holding

that a RICO claim had not accrued for a plaintiff who, because he had not collected on judgments awarded in earlier state proceedings, did not know the amount of his damages); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 728 (1995) ("[A]s a general rule, a cause of action does not accrue under RICO until the amount of damages becomes clear and definite."). *Accord Barnett v. Stern*, 909 F.2d 973, 977 n.4 (7th Cir. 1990) (in dicta, adopting *Bankers Trust* rule under facts similar to those in *Bankers Trust*); *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 847-48 (1st Cir. 1990) (adopting *Bankers Trust* rule for federal RICO claim where plaintiff has yet to win or collect judgment on state court action for his injury).

Siragusa argues that the facts of this case are nearly identical to those in *Bankers Trust:* She cannot know the amount of her damages until Vincent's bankruptcy proceeding has finished. If *Bankers Trust* were the law in the Ninth Circuit, Siragusa would be correct.

However, we have interpreted *Zenith* much more narrowly. In *Air Pollution*, we noted the limits of the *Zenith* decision:

> *Zenith* did not establish new standards for determining whether damages are ascertainable as of a particular date. . . . In *Bigelow* [*v. RKO Pictures, Inc.*, 327 U.S. 251 (1946)] and *Story Parchment Co.* [*v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931)], the Court faced the question whether damages were too uncertain for a jury to award damages. It is distinguished [sic] uncertain *damage*, which prevented recovery, from an uncertain *extent* of damage, which did not prevent recovery; that is, the failure to establish an

> injury, from the not uncommon imprecision with regard to its scope.

Air Pollution, 591 F.2d at 73; *see also Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 650 (9th Cir. 1988); *Pace*, 813 F.2d at 240; *Volk*, 816 F.2d at 1415 ("Damages recoverable under RICO, therefore, do not affect accrual of the cause of action or commencement of the limitations period."). Thus, "[t]he question of whether there is a right to recovery is not to be confused with the difficulty in ascertaining the scope or extent of the injury." *Pace*, 813 F.2d at 240. This directly conflicts with the Second Circuit's "clear and definite damages" rule.

Precedent aside, we disagree with the Second Circuit's interpretation of *Zenith*. *Zenith* dealt with lost future profits, which cannot be calculated until they are incurred – the uncertainty arose because future market conditions, upon which damages depended, had yet to unfold. In *Bankers Trust*, however, the RICO plaintiff had sustained a definable injury – the uncertainty in that case involved whether and to what extent the known injury would be mitigated by a bankruptcy court. In one, the injury is speculative because it is not known whether it will occur at all; in the other, the injury has occurred and is known, but it is speculative whether the damages might be reduced or even eliminated by alternative recovery efforts. We believe it would be error to equate the two.

In this Circuit, Siragusa's claim fails. She knew the value of her injury – the loss of her share of Vincent's medical practice interest – at the time she filed her bankruptcy complaint. That she might have been able to

recoup some of those damages in the bankruptcy proceeding did not preclude her from bringing her RICO action. We need not decide here whether subrogation or other devices would apply to prevent double recovery. It is enough to hold, as we do, that under *Pace* and *Volk* and *Air Pollution* and *Mir*, her RICO claim had accrued at the time she filed her adversary complaint.

VI.

For the foregoing reasons, the district court's dismissal of Siragusa's civil RICO claims is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

TOM GRIMMETT as Trustee for the Bankruptcy Estate of Vincent Siragusa and JOANNE M. SIRAGUSA, Plaintiffs, v. PATRICIA L. BROWN; PATRICIA L. BROWN, LIMITED, a Nevada Corporation; BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD., a Nevada Corporation; and DOES 1 through 100, Defendants.	CV-S-93-1155-PMP (RJJ) ORDER (Filed Mar. 14, 1994)

Before the Court is a Motion to Dismiss (# 5) filed by Defendants Patricia L. Brown ("Brown") and Patricia L. Brown, Limited, on January 3, 1994, and an Errata (# 6) also filed on January 3, 1994. Plaintiffs Tom Grimmett as Trustee for the Bankruptcy Estate of Vincent Siragusa ("Trustee") and Joanne Siragusa ("Joanne") filed their Opposition (# 12) on January 31, 1994, and a Supplemental Opposition (# 17) on March 1, 1994. Defendants filed their Reply (# 18) on March 8, 1994.

In considering Defendants' Motion to Dismiss, the factual allegations of Plaintiffs' Complaint must be presumed to be true, and this Court must draw all reasonable inferences in favor of Plaintiffs. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). The issue is not whether Plaintiffs will ultimately prevail, but whether they are entitled to offer evidence in support of their claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Consequently, the Court may not grant a Motion to Dismiss for failure to state a claim "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (Court will affirm dismissal of a complaint only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations"). The Court does not, however, necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in Plaintiffs' Complaint. *Western Mining Council v. Watts*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

On September 23, 1983, Joanne and Vincent Siragusa entered into a property settlement agreement in the process of getting divorced. The Complaint (# 1) alleges that all of the Siragusas' assets were community property, and further alleges that substantially all of the value of these marital assets were contained in Vincent Siragusa's ("Vincent") medical practice interest.[1] As part of the property

[1] As is explained *infra*, Vincent had his own cardiology practice, and had a one-third interest in two other medical

settlement, Joanne promised to release her one-half community property interest in Vincent's medical practice interest in exchange for certain periodic "marital payments," with the understanding that Joanne would have a lien against his medical practice interest to secure the marital payments and other obligations under the divorce decree. On February 29, 1984, Joanne and Vincent executed a Security Agreement and UCC-1 filing, and these documents were duly recorded on March 5, 1984.

The Complaint (# 1) alleges that Vincent had his own cardiac medical practice, known as Vincent Siragusa, Ltd. It also alleged that Vincent had a one-third interest in Heart Institute of Nevada, known by its acronym "HIN." Along with Vincent, Dr. Paul Heeren ("Heeren") and Dr. John A. Bowers ("Bowers") each owned one-third of HIN.[2] Additionally, Vincent, Heeren, and Bowers owned one-third equal shares in Heart Institute Cath Lab, known by its acronym "HICL."[3] Finally, the Complaint alleges that Vincent had a 27.55% interest in Heart Institute Property, or "HIP,"[4] and that Heeren and Bowers also had a

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groups. For present purposes, Vincent's interest in all three practices is referred to as his "medical practice interest."

[2] The respective doctors' interest in the various medical practices is sometimes referred to as their "medical practice interest."

[3] Plaintiffs allege that HICL leased medical equipment to HIN.

[4] Plaintiffs allege that HIP owned real property, and leased said property to HIN.

27.55% share, with the remainder of HIP owned by HIN doctor-employees.[5]

Generally, Plaintiffs allege that in or around November, 1986, Defendants began to implement a plan to divest Joanne of her interest in Vincent's medical practice. Specifically, Plaintiffs allege that the Defendants devised and implemented four schemes to fraudulently deprive Joanne and the Trustee of interests rightfully belonging to Plaintiffs. Plaintiffs describe these schemes as (1) a scheme to fraudulently acquire and maintain Siragusa's medical practice interest, (2) a scheme to fraudulently acquire and maintain Heeren's medical practice interest, (3) a scheme to defraud the CAN junior stockholders, and (4) a scheme to obstruct justice. According to Plaintiffs, the goal of each scheme was to impair the rights of both Joanne and the Trustee in Vincent's medical practice interest.

Although the details are somewhat confusing, Plaintiffs allege that Defendants undertook a fraudulent reorganization of the medical practices in order to divest Vincent of his interest in his medical practices, for which Vincent was paid little or no consideration. Thereafter, Vincent became a mere employee of HIN. Plaintiffs also

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[5] Plaintiffs also allege that Bowers owned Cardiology Associates of Nevada, known by its acronym "CAN." Plaintiffs further allege that sometime in April, 1990, Bowers sold 37.5% of CAN's common stock to CAN doctor-employees, and that he continued to sell some of CAN's common stock to CAN doctor employees, sometimes referred to as the "CAN junior associates," through November, 1991.

Also, CAN, HIP, HIN, and HICL shall be referred to as the "medical practices."

allege that Vincent filed a fraudulent bankruptcy under Chapter 7, in which he represented both that he was unable to pay Joanne the agreed upon payments detailed in the divorce decree, and that he had no equity left in his medical practice. The Complaint further alleges that this reorganization was accomplished in order to destroy Joanne's interest in Vincent's medical practice interest. Plaintiffs allege that the Heeren scheme, the CAN stock scheme, and the scheme to obstruct justice were also part of the plan to defraud Joanne of her interest in Vincent's medical practice interest.

Plaintiffs allege the following federal law violations as predicate acts: bankruptcy fraud under 18 U.S.C. § 152, mail fraud under 18 U.S.C. § 1341, wire fraud under 18 U.S.C. § 1343, obstruction of justice under 18 U.S.C. § 1503, and fraud in the sale of securities under various securities laws. The Complaint also alleges several state law violations, including grand larceny, embezzlement, obtaining money by false pretenses, perjury or subornation of perjury, offering false evidence, and securities fraud.

Defendants move to dismiss the Complaint, asserting that the Complaint fails to state Federal RICO claims, and that in the absence of cognizable federal claims, this court has no jurisdiction to decide the state law claims asserted in the Complaint.

Defendants assert that the Federal RICO allegations are barred by the statute of limitations. Defendants argue that the statute of limitations for RICO claims has run, as Plaintiffs knew or should have reasonably known of their injuries in May, 1989, and that the Complaint was filed

more than four years later, in November, 1993. Plaintiffs argue that they only discovered the role of Defendant Brown in the alleged racketeering activity in December, 1990, when "Heeren came forward with the truth of Brown's involvement." *Plaintiffs' Opposition* (# 12) at 15; *see also* Complaint (# 1) at 21 (alleging that "the fraudulent nature of the Reorganization activities by Defendants Brown and Beckley and the Participants are candidly described . . . in Heeren's December 28, 1990 Affidavit Re Reorganization" and in the related deposition testimony of Heeren and Heeren's wife).

The statute of limitations for Federal civil RICO actions is four years. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987); *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 274 (9th Cir. 1988). In this case, the dispute centers around when the four years begins to run. Plaintiffs argue that the statute of limitations should not begin to run until a plaintiff knows of his injury and of its source. This, however, clearly is not the rule in the Ninth Circuit. In this Circuit, RICO's four year statute of limitations begins to accrue to when a plaintiff "knows or should know of the injury which is the basis for the action." *Stitt v. Williams*, 919 F.2d 516, 525 (9th Cir. 1990). Knowledge regarding the source of one's injury is not a factor for statute of limitations purposes.

Defendants urge this Court to dismiss because they argue that Plaintiffs knew of their injury in May, 1989. Defendants point to the May 2, 1989, date in which Plaintiffs filed an action in an adversary proceeding in Vincent's bankruptcy alleging fraudulent reorganization.

Defendants argue that the complaint filed in that adversary proceeding (Adv. No. S-890068) demonstrates that Plaintiffs actually were aware of their injuries caused by the allegedly fraudulent reorganization of the medical entities as of the date that complaint was filed.

The Court has independently reviewed the complaint filed in Plaintiffs' adversary proceeding. The allegations contained in that complaint make it clear that Plaintiffs were aware that they had suffered an injury from the allegedly fraudulent reorganization of the medical entities. The injury alleged in that complaint was that Joanne and the Trustee had been defrauded out of their interest in Vincent's medical practice interest. This is the same injury which is the subject of the present Complaint.[6] Furthermore, the complaint in the adversary proceeding not only demonstrates that Plaintiffs were aware that they had been injured, but also indicates that Plaintiffs knew many of the underlying facts which gave rise to their injury. Thus, the Court finds as a matter of law that Plaintiffs' cause of action accrued no later than May 2, 1989, the date on which Plaintiffs filed their complaint in the adversary proceeding.

Plaintiffs argue that even if May 2, 1989, is the date of accrual, Defendants continued to commit racketeering

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[6] The Court recognizes that when Plaintiffs filed their Adversary Proceeding complaint, they may not have been aware, as they allege now, that Defendant Brown was involved in any allegedly fraudulent activity. Nevertheless, the rule in this Circuit focuses on when a plaintiff knew or should have known of his injury, and not when that plaintiff knew or should have known that a particular person caused that injury.

violations well after that date, and thus, suit on those violations should not be precluded. Plaintiffs seem to be arguing that a cause of action does not accrue until a plaintiff knows or should have known of the last predicate act which is part of the same pattern of racketeering activity. Although this is the rule in the Third Circuit, *see Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988), it is not recognized by the majority of courts, and in fact, is not the rule in the Ninth Circuit. The majority of courts hold that the statute of limitations begins to run when the plaintiff knew or should have known of his injury, regardless of whether the pattern of related racketeering activity continued. *See, e.g., Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-67 (1st Cir. 1990) (containing a list of citations);[7] *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102-03 (2d Cir. 1988).[8]

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[7] Analysis found in *Rodriguez* is especially applicable to the case at bar. The *Rodriguez* court explained that to permit a cause of action to accrue on the date of the last predicate act which is part of the same pattern of racketeering activity would be to extend the possible limitations period beyond all reason. *Rodriguez*, 917 F.2d at 667.

[8] The rule of "separate accrual" does not aid Plaintiffs. This rule states that for each injury caused by a RICO violation, the limitations period accrues, for that injury, when the plaintiff knew or should have known of the injury. *See State Farm Mutual Automobile Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J. concurring); *Madariaga*, 851 F.2d at 275; *Bankers Trust Co.*, 859 F.2d at 1103; *Levin-Richmond Terminal Corp. v. Local 10*, 751 F. Supp. 1373, 1376 (N.D. Cal. 1990). The rule of separate accrual applies to additional, independent injuries that may result from the same RICO violations. *Bankers Trust Co.*, 859 F.2d at 1103. Here, although Plaintiffs allege that Defendants continued to engage in RICO violations well after May, 1989,

Therefore, this Court finds that because Plaintiffs knew of their injury no later than May, 1989, and because they filed the present action on November 24, 1993, more than four years after the date of accrual, Plaintiffs' RICO claims are barred by the statute of limitations. Plaintiffs' federal RICO claims provide the sole basis for this Court's jurisdiction. Thus, without those claims, the pendent state law claims should also be dismissed. *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985); *Jones v. Community Redevelopment Agency*, 733 F.2d 646 (9th Cir. 1984); *Copeland v. Desert Inn Hotel*, 673 P.2d 490, 492 (Nev. 1984).

IT IS THEREFORE ORDERED THAT Defendants' Motion to Dismiss (# 5) is granted.

DATED: March 14, 1994

/s/ Philip M. Pro
PHILIP M. PRO
United States
District Judge

Plaintiffs do not allege a separate or independent injury resulting from the continued acts. Rather, Plaintiffs allege one continuing pattern of racketeering activity which injured their claim to Vincent's medical practice interest.

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

TOM GRIMMETT as Trustee for the Bankruptcy Estate of Vincent Siragusa and JOANNE M. SIRAGUSA, Plaintiffs, v. PATRICIA L. BROWN; PATRICIA L. BROWN, LIMITED, a Nevada Corporation; BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD., a Nevada Corporation; and DOES 1 through 100, Defendants.	CV-S-93-1155-PMP (RJJ) ORDER (Filed June 1, 1994)

Before the Court is a Motion to Reconsider Order Dismissing Claims Against Patricia Brown on Statute of Limitations Grounds (# 22), filed by Plaintiffs Tom Grimmett as Trustee for the Bankruptcy Estate of Vincent Siragusa ("Trustee") and Joanne Siragusa ("Joanne") on March 18, 1994 (Dismissal Order at # 19). Defendants Beckley, Singleton, Delanoy, Jemison & List, Chtd. ("Beckley Singleton") filed its Opposition (# 23) on March 25, 1994, and Defendants Patricia L. Brown and Patricia L. Brown, Limited (hereinafter collectively referred to as "Brown"), filed an Opposition (# 27) on April 5, 1994.

Plaintiffs filed their Reply (# 30) on April 13, 1994. The Court heard oral argument on the Motion to Reconsider (# 22) on May 26, 1994.

Plaintiffs' Motion for Reconsideration asks this Court to rule specifically on the issue of whether this Court should apply the doctrine of equitable tolling, to prevent the statute of limitations from barring Plaintiffs' suit. The facts of this case are set forth in this Court's March 18 Dismissal Order (# 19).

Plaintiffs assert that *Emrich v. Touch Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988), and *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980), support their position that the Court should equitably toll the statute of limitations on their RICO action.

The parties disagree as to the proper interpretation of *Emrich*. The court in *Emrich* noted that where a federal district court applies a state statute of limitations, the court must also apply that state's equitable exceptions. *Emrich* noted further that where the applicable statute of limitations is derived from federal law, "federal equitable tolling doctrines apply." *Emrich*, 846 F.2d at 1199.

Plaintiffs argue that *Emrich* demands, at the very least, that this Court deny Defendants' Motion to Dismiss because they assert that outstanding factual issues must be resolved in the process of applying the federal equitable tolling doctrine. Although it is true that the *Emrich* court remanded that case to the district court to let the district court "resolve certain disputed factual matters," *Emrich*, 846 F.2d at 1199, the *Emrich* court never specified what factual matters the district court in that case had to

decide when considering the equitable tolling issue. Thus, the Court finds that *Emrich*, standing alone, does not compel this Court to reverse itself and deny Defendants' Motion to Dismiss. Instead, the Court must determine, as the district court in *Emrich* was commanded to do, whether the federal equitable tolling doctrine should be applied to toll the four year RICO statute of limitations in this case.

To support their argument that equitable tolling should be applied to their RICO claim, Plaintiffs point to *Mt. Hood*. Plaintiffs contend that where there are two statutory schemes (here, bankruptcy and RICO) that are dependent upon one another, a proceeding under one scheme tolls a proceeding under the other. Thus, Plaintiffs assert that their Adversary Proceeding in the Bankruptcy Court should toll any RICO claims that the statute of limitations might otherwise force them to bring.

Community Elec. Service v. National Elec. Contr., 869 F.2d 1235, 1241 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989), provides a good summary of the facts of *Mt. Hood*. "Mt. Hood, a bus company, asked the Interstate Commerce Commission to modify its approval on acquisitions by Greyhound, a competitor. Mt. Hood later filed an antitrust suit against Greyhound. Greyhound would have argued that the acquisitions were immune had Mt. Hood sued before the ICC made the modification requested. We decided that the doctrine of primary jurisdiction provides the 'relevant federal procedural law to guide the decision to toll the limitations period.' This follows because the court could issue no injunction and award no damages until the ICC exercised its primary jurisdiction." (citations omitted).

Mt. Hood stands for the general proposition that "equitable tolling is most appropriate when the plaintiff is required to avail himself of an alternate course of action as a precondition to filing suit." *Conley v. International Bro. of Elec. Workers*, 810 F.2d 913, 915 (9th Cir. 1987) (citing *Mt. Hood*). *Mt. Hood* has been applied more specifically to circumstances in which "an administrative agency decide[d] determinative issues within its primary jurisdiction." *Pace Indust., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 241 (9th Cir. 1987); *see also Nichols v. Hughes*, 721 F.2d 657, 660 (9th Cir. 1983) ("In this circuit, the general rule is that if prior resort to an administrative body is a prerequisite to review in court, the running of the limitation will be tolled during the administrative proceeding") (citing *Mt. Hood*).

Thus, the question becomes whether the Bankruptcy Court, in an exercise of its primary jurisdiction, had to first decide "determinative issues" before this Court could hear Plaintiffs' RICO claim. This question is suggested by *Mt. Hood*, because in that case, the court held that where another tribunal was vested with the primary responsibility for making a decision that would determine the outcome of the proceeding, the statute of limitations on the proceeding would be tolled while the parties pursued their rights in front of the other tribunal.

This question is also suggested by *Bankers Trust Company v. Rhoades*, 859 F.2d 1096 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989). That case held, *inter alia*, that the creditor plaintiff's RICO action was tolled during the debtor's bankruptcy action. This holding, however, was based not upon equitable tolling grounds, but rather on the Second Circuit's interpretation of when a RICO action

accrues. The question presented in this case appears to be whether there are any issues that must first be determined by the Bankruptcy Court before Plaintiffs could assert their RICO action. This may take the form either of a primary jurisdiction issue, as in *Mt. Hood*, or the form of an accrual question, as in *Bankers Trust*.

In this case, there appears to be no determination of the type discussed in *Mt. Hood* that is committed to the primary jurisdiction of the Bankruptcy Court which would prevent this Court from proceeding with Plaintiffs' RICO claim. Even with the automatic stay that is imposed in bankruptcy cases, one party could move to lift that stay. Furthermore, there is no indication that the Plaintiffs could not assert their RICO claim in the adversary proceeding, although it would be subject to a motion to sever. *See, e.g., Barnett v. Securities Group*, 2 F.3d 1098, 1099 (11th Cir. 1993) (RICO claim brought in an adversary proceeding). In short, the Court finds that *Mt. Hood* does not provide the basis upon which to apply equitable estoppel and toll the statute of limitations.

Additionally, this Court finds the rationale behind the holding of *Bankers Trust* to be unpersuasive, and thus chooses not to apply *Bankers Trust* to the present case. Bankers Trust was a creditor in the bankruptcy case of a debtor corporation, and was also the plaintiff seeking to bring a RICO claim against those accused of fraudulently reorganizing the corporation and rendering the corporation bankrupt. In *Bankers Trust*, the court held that any damages that Bankers Trust suffered as a result of the alleged fraudulent reorganization of the debtor corporation might be offset by whatever fraudulently transferred assets the trustee in bankruptcy could recover. Thus, the

Bankers Trust court noted that until the bankruptcy court determined what the trustee in bankruptcy could recover, Bankers Trust's damages were speculative and their amount unprovable. The court reasoned that because a RICO action does not accrue until the plaintiff knows or should know of the damages resulting from the RICO injury, Bankers Trust's RICO claim had not accrued, and would not accrue until such time as the amount recovered by the bankruptcy trustee were determined, so that Bankers Trust's damages could be determined.

In concluding that Bankers Trust injury was speculative and unprovable until it was determined how much the trustee in bankruptcy would recover, the *Bankers Trust* court relied heavily on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971).

Zenith was a case in which the Supreme Court considered when a claim for future profits accrued under the federal antitrust act. The Court noted that "if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date." *Zenith Radio Corp.*, 401 U.S. at 339. On the other hand, the Court stated that "even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature

unprovable."[1] *Id.* The Supreme Court concluded by stating that "in antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered." *Zenith Radio Corp.*, 401 U.S. at 339.

In sum, the Court in *Zenith Radio Corp.* was concerned with the issue of whether to allow purely speculative proof of loss of future profits. Concluding that such speculation was not admissible, the Court held that such a cause of action does not even accrue until the damages are ascertainable.

As noted by several courts, *Zenith Radio Corp.* did not change the standard for determining whether damages are speculative. *See, e.g., Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 650 (9th Cir. 1988); *Pace Industries*, 813 F.2d at 240. Those courts also noted that:

> uncertain damages, which prevent recovery, are distinguishable from uncertain extent of damage, which does not prevent recovery. The former denotes failure to establish an injury, while the latter denotes imprecision with regard to the scope or extent of the injury. The question of whether there is a right to recovery is not to be confused with the difficulty in ascertaining the scope or extent of the injury.

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[1] The Second Circuit in *Bankers Trust* seized upon this latter language, to support its conclusion that Bankers Trust's injury was "unprovable" until it was determined what the trustee in bankruptcy could recover. *Bankers Trust*, 859 F.2d at 1106.

Pace Industries, 813 F.2d at 240 (internal citations omitted); *Mir*, 844 F.2d at 650 (citing *Pace Industries*).

In the present case, the amount of damages that would "place the Plaintiff in the same financial position [s]he would have occupied absent the illegal conduct," *Bankers Trust*, 859 F.2d at 1106, were determinable at the time Plaintiffs filed their Adversary Complaint, which contained allegations virtually identical to those contained in their present RICO Complaint. That is, Joanne Siragusa's claim to half of Vincent Siragusa's interest in his various medical practices was ascertainable when Plaintiffs filed their Adversary Proceeding, because the value of Vincent's interest in his medical practices before such interest was allegedly fraudulently concealed was quantifiable.

Plaintiffs' position fails to follow *Pace*'s instruction to distinguish between damages which themselves are uncertain, and damages whose *extent* is uncertain. *Pace*, 813 F.2d at 240. Although it may be true, as pointed out by the *Bankers Trust* court, that Plaintiffs' exact damages will not be known until it is determined what the trustee in bankruptcy recovers, the existence of said damages was both knowable and provable as of the date on which Plaintiffs filed their Adversary Proceeding. All that would remain, should Plaintiffs prove their RICO case, would be to determine exactly how much Plaintiffs should recover, a figure that ostensibly would be offset by an amount recovered by the trustee in bankruptcy, and thus recoverable by Plaintiffs.

The Court therefore finds that the statute of limitations should not be tolled in this case. Neither the doctrine of equitable estoppel nor the rule of accrual supports Plaintiffs' position. Plaintiffs should have either filed their RICO claim in their Adversary Proceeding, or in a separate action in 1987.

IT IS THEREFORE ORDERED THAT Plaintiffs' Motion to Reconsider Order Dismissing Claims Against Patricia Brown on Statute of Limitations Grounds (# 22) is denied.

IT IS FURTHER ORDERED THAT the Motion to Dismiss (# 20) filed by Defendant Beckley, Singleton, Delanoy, Jemison & List, Chtd. is granted.

DATED: June 1, 1994

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

(2)

No. 95-1723

In The

Supreme Court of the United States

October Term, 1995

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA

and

JOANNE SIRAGUSA,

Petitioners,

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD.,

and

BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS TO BE PRESENTED

1. Whether the Ninth Circuit Court's decision that a civil RICO cause of action accrues when a plaintiff knows or should have known that he has been injured, as opposed to when he knows that the injury was caused by a defendant and is part of a pattern of racketeering activity is correct.

2. Whether the statute of limitations for a civil RICO cause of action can be tolled because of an ongoing bankruptcy proceeding or other suit for damages in another forum.

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JURISDICTION

The jurisdiction is laid out appropriately in the subject Petition for Writ of Certiorari. As a result, these Respondents rely upon such jurisdictional representations by Petitioners.

STATEMENT OF THE CASE

It is Respondents' position that the subject Petition for Writ of Certiorari should be denied based upon Petitioners' failure to bring their claim for RICO cause of action prior to the extinguishment of their right to do so, as pursuant to the four (4) year statute of limitations. Petitioners knew of their injury in May of 1989. They filed a Complaint in Bankruptcy Court alleging the same predicate facts as found in their Complaint filed with the United States District Court for the District of Nevada in November of 1993. Accordingly, the District Court was correct, as well as the Ninth Circuit, in reasoning that Petitioners should have brought their RICO cause of action in Bankruptcy Court in 1989, and because they failed to do so, the statute of limitations bars those claims as of November of 1993.

Equitable tolling was denied by both the District Court and the Ninth Circuit in this matter, premised upon Petitioners' failure to demonstrate any "determinative issues" which needed to be decided in Bankruptcy Court prior to their bringing the RICO action in the United States District Court. Based upon Petitioners' inability to illustrate underlying prerequisites necessary in Bankruptcy Court before they could bring their RICO cause of

action in that particular court to either the Ninth Circuit or the District Court, equitable tolling does not apply.

ARGUMENT

I.

THE APPEAL COURT'S DISMISSAL OF SUIT AS BARRED BY THE STATUTE OF LIMITATIONS WAS APPROPRIATE

The decision by the United States District Court to dismiss the case as barred by the statute of limitations was appropriate based on the relative case law and its interpretation.

(A) IN THE NINTH CIRCUIT, FEDERAL RICO CLAIMS' FOUR YEAR STATUTE OF LIMITATIONS BEGINS TO ACCRUE WHEN A PLAINTIFF KNOWS OR SHOULD KNOW OF THE INJURY WHICH IS THE BASIS FOR THE ACTION

Both the United States District Court for the District of Nevada and the United States Court of Appeals for the Ninth Circuit dismissed the present suit holding the statute of limitations had run prior to the commencement of this action.

The uncontroverted rule of law in this case is that the statute of limitations for federal/civil RICO actions is four (4) years. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156, 107 S.Ct. 2759 (1987); *Beneficial Standard Life Insurance Co. v. Madariaga*, 851 F.2d 271, 274 (9th Cir. 1988).

Despite this rule of law, there are, at least, three (3) distinct rules for accrual of a civil RICO claim. These

accrual rules are explained in detail in Petitioners' Writ of Certiorari and, in the interest of brevity, will only be defined in this Opposition.

The "injury discovery" rule is an import from the general Federal Rule of Accrual and is followed by the First, Second, Fourth, Fifth, Seventh, and Ninth Circuit Courts. This rule states that a civil RICO action limitation begins to run when a plaintiff knows or should know of the injury that underlines his action.[1]

The "injury and pattern discovery" rule followed by the Sixth, Eighth, Tenth, and Eleventh Circuit Courts maintains that a plaintiff must discover or be in a position to discover the existence of a pattern of racketeering activity in addition to the existence of the injury.[2]

The "Last Predicate Act" rule is followed by the Third Circuit and holds, quite favorably for plaintiffs, that the statute of limitations begins to run the date a plaintiff knew or should have known of the elements of the civil RICO cause of action, unless there is further

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[1] *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *Rodriguez v. Banco Cent.*, 919 F.2d 664, 665-68 (1st Cir. 1990); *Bankers Trust Co. v. Rhodes*, 859 F.2d 1096, 1102 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *LaPorte Constr. Co. v. Bayshore Nat. Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992).

[2] *Caprioni v. Prudential Securities, Inc.*, 15 F.3d 614, 619 (6th Cir. 1994); *Bath v. Buskhin, Games, Gaines & Jonas*, 913 F.2d 817 (10th Cir. 1990); *Bevins Office Garden Building, Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991); *Granite Falls Bank v. Hendrickson*, 924 F.2d 150, 154 (8th Cir. 1991).

injury, and is part of the same pattern. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-31 (3rd Cir. 1988).

As stated above, the Ninth Circuit holds fast to the injury discovery rule. The seminal case on this issue is *Stitt v. Williams*, 919 F.2d 516, 525 (9th Cir. 1990). In that case, the Ninth Circuit clearly set forth the rule that the statute of limitations begins to accrue when a plaintiff "knows or should know of the injury which is the basis for the action". *Stitt, supra*, 919 F.2d at 525. Further, knowledge regarding the source of one's injury is not a factor for a statute of limitations purpose. *Id.*

This rule set forth by the Ninth Circuit is in accord with the First, Second, Fourth, Fifth, and Seventh Circuits which follow the most restrictive rule. *Rodriguez v. Banco Cent.*, 917 F.2d 664, 665 (1st Cir. 1990); *Bankers Trust Co. v. Rhodes*, 859 F.2d 1096, 1103 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1007, 109 S.Ct. 1642, 104 L.Ed.2d 158 (1989); *Pocahontas v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *LaPorte Constr Co. v. Bayshore Nat. Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986).

The First Circuit Court clearly articulated the rule for the accrual of the limitations for Federal RICO actions in the case of *Rodriguez v. Banco Cent.*, 917 F.2d 664 (1st Cir. 1990). In that case, purchasers of land in Florida, which turned out to be a swamp, brought suit against a vendor alleging violations of the land sales act, securities laws, and Racketeer Influenced and Corruption Organization Act. The court held, among other things, that the four (4) year statute of limitations for civil actions under the RICO Act accrues when a plaintiff discovers or should have discovered his injury, and not when a plaintiff

should have known about the last predicate act which is part of the same pattern of racketeering activity alleged. *Rodriguez v. Banco Cent., supra.* In accord with this holding in the Ninth Circuit are the cases of *Beneficial Standard Life Ins. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988) and *State Farm Auto Ins. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987). Thus, in the Ninth Circuit, the statute of limitations begin to run when a plaintiff discovers or should have discovered his injury, not when the last predicate act alleged could have produced the continued injury. In this particular case, the Ninth Circuit declined not to change its holding, as referenced in the above-cited cases, and determined that the statute of limitations begins to run when a plaintiff knew or should have known of the injury, and not when the last predicate act alleged occurred. As a result, this disposition has been held by the Ninth Circuit for over eight (8) years, and these Respondents would request this Court to not now overturn that ruling.

As the First Circuit succinctly laid out in the *Rodriguez* case at page 667, the reasons for not adopting the last predicate act doctrine are as follows:

> The "Last Predicate Act" rule can produce long limitation periods. As we have pointed out, that rule would permit a plaintiff, knowing of his injury in 1980, to begin suit to recover damages for that injury four (4) years after the last predicate act that is part of the pattern of racketeering activity that caused the harm. A "pattern of racketeering activity" merely requires two (2) specified criminal acts, "the last of which occurred within ten (10) years . . . after the commission of the prior act," 18 U.S.C. § 1961,

(5) and when to relate it to the amount to or pose a threat of continued criminal activity." (citations omitted). If the quotation "pattern" took the form of one related act, say, every two (2) years (so that each act "occurred within ten (10) years . . . after a prior act"), say, for thirty or forty years, the Third Circuit's test literally interpreted, would permit a plaintiff "injured in 1980" to bring suit thirty-four or forty-four years later. Even if one somehow led the statutory "ten year" referenced to cut off the chain or related events, the rule would extend the statute of limitations, giving a fully knowledgeable plaintiff fourteen, rather than four (4) years to bring suit. Such a reading of the statute is difficult to reconcile with the Supreme Court's determination that "there is a need for uniform statute of limitations for civil RICO" less the memories of witnesses fade or evidence [be] . . . lost. (citations omitted.) In fact, it seems directly inconsistent with the Supreme Court's choice of a four (4) year claim max statute instead of criminal RICO's five (5) year statute of limitations which indeed runs from the "last predicate act" (citations omitted). In any event, we do not know why a knowledgeable plaintiff should have fourteen rather than four (4) years to bring suit.

In the instant matter, Petitioners are apparently attempting to confuse the issue. The true nature of this case is that the Ninth Circuit in *Stitt v. Williams*, 919 F.2d 619, 624 (9th Cir. 1958) specifically adopted the rule of the First, Second, Fourth, Fifth, and Seventh Circuits. That rule unwaveringly holds that a RICO cause of action accrues when a plaintiff discovers or should have discovered his injury, as opposed to when a plaintiff knows or

has reason to know of the source of that injury. *See, Stitt, supra*, 919 F.2d at 525; *Rodriguez, supra*, 917 F.2d at 667; *Beneficial Life Ins. Co., supra*, 815 F.2d at 275; *State Farm Auto Ins., supra*, 828 F.2d at 5.

It is Petitioners' assertion that "the Ninth Circuit panel's defense in the injury discovery rule is weak and even incoherent." *See*, Petitioners' Writ of Certiorari, at p. 12. The court's defense of the injury discovery rule is clearly stated and leaves no room for argument. The Ninth Circuit explained that Petitioners' argument suggesting that the continuity prong of the elements which require at least one year to mature and the inherent problems with pulling an entire case together within the remaining three (3) year statute did nothing to advance their argument in favor of the injury and pattern discovery rule. *See*, the Ninth Circuit opinion, at p. 12, attached to Petition, Appendix "A". The Ninth Circuit also reasoned that this argument was not "persuasive enough to warrant abandonment of the injury discovery rule". *Id.* at 12, attached to Petition, Appendix "A". In fact, during the time of the hearing on this particular matter, the three (3) judge panel suggested to Petitioners that what they were requesting was for the Ninth Circuit to overturn a hard and fast rule when Petitioners, themselves, at no time requested an en banc hearing of this matter. The injury discovery rule, the court adds, encourages diligence in RICO prosecutions and ensures that this Circuit's rule that a civil RICO course of action arises when a plaintiff knows or should know that he has been injured. *Id.* at 12, attached to Petition, Appendix "A". Also, a review of the cases of *State Farm, supra*, and *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984) demonstrates the Ninth Circuit has

unwaveringly declined to apply the pattern discovery rule. As pointed out in *Compton, supra*, 732 F.2d at 1433, this Court held that a civil RICO limitations period "begins to run when a plaintiff knows or has reason to know of the injury which is the basis of the action."

Therefore, the test for the accrual of the statute of limitations is not when the last predicate act allegedly occurred, as Petitioners profess it should be, but rather, the statute begins to run when a plaintiff discovers or should have discovered the alleged injuries. The Complaint for civil RICO actions and subsequent supplemental authority for RICO and state causes of action would thus be barred by the Ninth Circuit rule if Petitioners discovered or should have discovered their alleged injuries prior to November 29, 1989. The Order issued by the lower court, as well as the Complaint filed in the Bankruptcy Court, clearly illustrate to this Honorable Court that Petitioners discovered their injuries as early as May of 1989, when they alleged the same fraudulent activities in Bankruptcy Court as are found in Petitioners Complaint filed with the United States District Court for the District of Nevada. *See*, Petition, Appendix "B".

Interestingly enough, in the preliminary bankruptcy proceedings, to avoid dismissal based upon the statute of limitations, Petitioners argued at that time that their Complaint as against these Respondents, filed in 1990, should be related back to May, 1989. When Petitioners filed their RICO Complaint, the United States District Court for the District of Nevada determined that once this relation back was applied in Bankruptcy Court, it became clear that Petitioners' federal RICO statute began to run when the injury was discovered, which that court

believed was evidenced by the filing of the original Complaint in Bankruptcy Court in May of 1989. The District Court reasoned that because Petitioners knew of their injuries, their claims were barred as against these Respondents, pursuant to the four (4) year statute of limitations applicable to the RICO cause of action. *See, Stitt v. Williams*, 919 F.2d 516 (9th Cir. 1990). *See, also*, Petition, Appendices "B" and "C".

II.

THERE IS NO LEGAL BASIS FOR ANY CLAIM FOR A TOLLING OF THE STATUTE

None of the arguments for tolling convinced the lower courts enough to prompt further exploration into the issue. Thus, the rule in this Circuit, as well as the majority rule, holds that the statute of limitations begins to run when a plaintiff should have known of his injury, regardless of whether the pattern of related racketeering activity continued. *See, Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-67 (1st Cir. 1990); *Bankers Trust Co. v. Rhodes*, 859 F.2d 1096, 1102-03 (2nd Cir. 1988). Accordingly, because Petitioners knew of their injury no later than May of 1989, and because they filed the present action on November 24, 1993, more than four (4) years after the date of accrual, Petitioners' RICO claims are barred by the statute of limitations.

Equitable tolling is completely inapplicable in the present case. Petitioners claim the case of *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir. 1980), *cert. denied*, 449 U.S. 831 (1980) stands for the general proposition that, "Equitable tolling is most appropriate when a

plaintiff is required to avail himself of an alternative course of action as a pre-condition to filing suit." *Connolly v. International Brothers of Electrical Workers*, 810 F.2d 913, 915 (9th Cir. 1987), citing *Mt. Hood, supra*. However, the case of *Mt. Hood* has been applied more specifically to circumstances in which "any administrative agency decided to determine issues with its primary jurisdiction." *Pace Industrial, Inc. v. Three Phoenix Co.*, 813 F.2d 234, 241 (9th Cir. 1987); *See, also, Nichols v. Hughes*, 721 F.2d 657, 660 (9th Cir. 1983). ("In this Circuit, the general rule is that if prior resort to administrative body is a prerequisite to relief in court, the running of the statute of limitations will be tolled during the administrative proceeding"), citing *Mt. Hood, supra*. Thus, the only question then becomes whether the Bankruptcy Court, in the exercise of its primary jurisdiction, had to first decide "determinative issues" before this Court could hear Petitioners' RICO claim. Both the District Court and the Ninth Circuit ruled that they did not. Clearly, in the adversarial proceeding filed in the bankruptcy matter, Petitioners could have alleged their RICO cause of action. They did not and, as a result, must bear the burden for their decision not to do so.

Since the *Mt. Hood* case, the Ninth Circuit Court has gone to great lengths to distinguish and to restrict its holdings concerning equitable tolling. The Ninth Circuit has stated on several occasions that the holding in the *Mt. Hood* case was premised upon considerations of federal policy and primary jurisdiction, and nothing more. *Pace Industrial, Inc. v. Three Phoenix Co.*, 813 F.2d 234, 241 (9th Cir. 1987); *Community Electric Services of Los Angeles, Inc. v. Nat. Electrical Contractors Assoc., Inc.*, 869 F.2d 1235,

1241 (9th Cir. 1989). In the above-cited cases, the Ninth Circuit refused to expand equitable tolling as found in the *Mt. Hood* case where federal considerations and primary jurisdiction were not at issue. In the case of *Pace, supra*, it was argued that the statute of limitations should be suspended pending the outcome of the state court action. The Ninth Circuit Court held that prior judicial actions "do not toll the statute of limitations, no matter how close the relationship to the one at bar", citing *Ramirez Dearellano v. Alvarez DeChoudens*, 575 F.2d 315, 319 (1st Cir. 1978); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 708, 86 S.Ct. 1107, 1114-15, 16 L.Ed.2d 192 (1966).

In the case of *Community Electric, supra*, citing *Nichols v. Hughes*, 721 F.2d 657, 660 (9th Cir. 1983), the Ninth Circuit decided not to extend the equitable tolling doctrine to a position where Union Local 440 brought proceedings before the National Labor Relations Board to establish its subsistence of payments as a mandatory subject of bargaining. The appellants in that case determined that the NLRB hearing should toll the statute of limitations. In that case, this Court held that the NLRB proceedings had not tolled the limitations, since prior resort to the board was not a prerequisite to review in federal court. This Circuit cited the case of *Nichols v. Hughes*, 721 F.2d 657, 660 (9th Cir. 1983).

In both of the aforementioned cases, the Ninth Circuit expressly held that in order for equitable tolling to apply, the *underlying prerequisite* must be mandatory before bringing an action in the court where the statute of limitations is asked to be tolled.

In the case at bar, Petitioners' attempted to bring forth the argument that they did not know the amount of damages, and that it was necessary for the bankruptcy proceeding to come to an end to make such a determination, was its prerequisite to bring a federal RICO action. This reasoning is wholly inappropriate and, as the United States District Court for the District of Nevada found, such "damage assessment" is not a prerequisite to bring a federal RICO claim in federal court. Moreover, the lack of diligence to discover all causes of actions at the time of bringing an initial suit is considered dilatory and does not mandate the tolling of the statute of limitations. *See, In Re: United States Management, Inc.*, 14 F.3d 1380 (9th Cir. 1994). As held in the matter of *In Re: United States Management, Inc.*, Petitioners in the instant matter are charged with the notice of all causes of actions that their investigation should have brought to light in May of 1989, the time of filing their original Complaint in Bankruptcy Court. Through over four (4) years of investigation, Petitioners allege they did not know that they had a RICO cause of action. However, the injury was well known. All facts were present which would have placed Petitioners on notice of their RICO cause of action and their dilatory tactics in not bringing that cause of action within four (4) years from May, 1989, does not amount to the federal policy considerations found in the Ninth Circuit to toll the statute of limitations.

Furthermore, the Ninth Circuit in this case held that given the aforementioned interpretation of the *Mt. Hood* case, Petitioners' claim fails. The Ninth Circuit determined, "Unlike the ICC's jurisdiction over immunity claims, the primary jurisdiction of the Bankruptcy Court

is not RICO claims. With respect to RICO claims, the Bankruptcy Court and federal court are more properly considered parallel avenues of relief." Even if Petitioners could have raised their RICO claim in some form in the bankruptcy proceedings, they could have simultaneously pressed their claim in federal court since the automatic stay did not apply to her claim against these Respondents, who were not the debtor. *See*, 11 U.S.C. § 362(a); *In Re: Kalispell Feed & Grain Supply*, 55 B.R. 627, 629 (Bankr.D.Mont. 1985); *In Re: Monetary Group*, 2 F.3d 1098, 1099 (11th Cir. 1993). Thus, the bankruptcy proceeding did not toll her RICO claim. *See*, the Ninth Circuit Order, at p. 21, attached to Petition, Appendix "A".

Therefore, due to the fact that Petitioners knew of the injury, not necessarily damages, no later than May of 1989, and because they filed the present action on November 24, 1993, more than four (4) years after the date of accrual, Petitioners' RICO claims are barred by the statute of limitations. Likewise, the bankruptcy proceeding does not toll the statute of limitations on the RICO claims.

III.

CONCLUSION

Based upon the foregoing, Respondents **PATRICIA L. BROWN** and **PATRICIA L. BROWN, LTD.** respectfully request this Honorable Court to deny the Petition for Writ of Certiorari presently before it upon the grounds that Petitioners' civil RICO claim is barred by the four (4) year statute of limitations and, further, that the ongoing bankruptcy proceeding does nothing to affect the running of

the statute of limitations. Therefore, such cannot preserve the claims since the statute of limitations has run.

Furthermore, Respondents respectfully request this Honorable Court to sustain the decision of the Ninth Circuit Court of Appeals and refuse to grant Petitioners' Writ in the instant matter.

DATED this 24th day of May, 1996.

Respectfully submitted,

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Supreme Court, U.S.
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No. 95-1723

In The

Supreme Court of the United States

October Term, 1995

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA, and JOANNE SIRAGUSA,

Petitioners,

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., and BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For A Writ Of Certiorari Filed April 22, 1996
Certiorari Granted June 17, 1996

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RELEVANT DOCKET ENTRIES

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 94-16137 Filed: 7/5/94

Proceedings include all events.
94-16137 Siragusa, et al v. Brown, et al.

TOM GRIMMETT, as Trustee for the Bankruptcy Estate of Vincent Siragusa

Plaintiff

and

JOANNE SIRAGUSA

Plaintiff - Appellant

v.

PATRICIA L. BROWN; PATRICIA L. BROWN, LIMITED, a Nevada Corporation; BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHARTERED, a Nevada Corporation

Defendants - Appellees

7/5/94	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): yes. setting schedule as follows: CADS due 7/19/94 for David B. Smith; appellant's designation of RT is due 7/1/94; appellee's designation of RT is due 7/11/94,; appellant shall order transcript by 7/21/94; court reporter shall file transcript in DC by 8/22/94,; certificate of record shall be filed by 8/29/94; appellant's opening brief is due 10/7/94; appellees' brief is due 11/7/94,; appellants' reply brief is due 11/21/94; [94-16137] (vt) [94-16137]

8/3/94 Filed certificate of record on appeal RT filed in DC N/A [94-16137, 94-16214] (wd) [94-16137 94-16214]

10/7/94 Filed original and 15 copies Appellant Joanne Siragusa in 94-16137 opening brief (Informal: no) 32 pages and five excerpts of record in 01volumes; served on 10/5/94 [94-16137] (ot) [94-16137]

11/4/94 Filed motion & order: (Deputy Clerk: cb) granting Aplt Grimmett's motion for relief from default. The CADS submitted with the motion shall be filed. Nos. 94-16137 and 94-16214 are cons. FRAP 3(b). The Excerpts of Record filed in 94-16137 shall be applied to both appeals. The opening brief rcv in 94-16214 shall be filed. The appellees' brief is now due 12/5/94; record on appeal due 12/12/94; the reply brief due 14 days from svc of aple's brief, in 94-16137 (Motion recvd 10/27/94) [94-16137, 94-16214] (ot) [94-16137 94-16214]

11/9/94 Filed Amended order (Deputy Clerk: cb/ pro) Aplt's Grimmett's motion for relief from default is granted. The CADS submitted with the motion shall be filed. Nos. 94-16137 and 94-16214 are cons. FRAP 3(b). Aplt Grimmett has corrected the opening brief's deficiency. The opening brief rcv in 94-16214 shall be filed. The answering brief is now due 12/5/94; record on appeal due 12/12/94; appellants' reply brief is due 14 days from svc of aples brief, in 94-16214 [94-16137, 94-16214] (ot) [94-16137 94-16214]

11/14/94 Filed original and 15 copies appellee Beckley, Singleton in 94-16137's 22 pages brief,; served on 11/10/94 [94-16137, 94-16214]

appellants' reply brief due 11/25/94 in 94-16137, in 94-16214; (ot) [94-16137 94-16214]

12/1/94 Filed original and 15 copies appellees Patricia L Brown and Patricia L Brown Ltd 28 pages brief, 05 Exc. 01 vols: ; served on 11/14/94 [94-16137, 94-16214] appellants' reply brief due 11/28/94 in 94-16137, in 94-16214; (ot) [94-16137 94-16214]

12/1/94 Filed original and 15 copies Joanne Siragusa in 94-16137 reply brief, (Informal: no) 11 pages; served on 11/30/94 [94-16137] (ot) [94-16137]

8/25/95 Calendar check performed [94-16137, 94-16214] (aw) [94-16137 94-16214]

9/28/95 Calendar materials being prepared. [94-16137, 94-16214] [94-16137, 94-16214] (mw) [94-16137 94-16214]

10/6/95 CALENDARED: San Francisco Dec. 6, 1995 9:00 a.m. Courtroom 2 ** ctrm changed to Ctrm 3 ** [94-16137, 94-16214] (dd) [94-16137 94-16214]

12/6/95 ARGUED AND SUBMITTED TO James R. BROWNING, William C. CANBY, Cynthia H. HALL [94-16137, 94-16214] (ah) [94-16137 94-16214]

1/26/96 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. James R. BROWNING; William C. CANBY; Cynthia H. HALL, author.) FILED AND ENTERED JUDGMENT. [94-16137, 94-16214] (ot) [94-16137 94-16214]

2/20/96	MANDATE ISSUED [94-16137, 94-16214] (mlm) [94-16137 94-16214]
5/1/96	Rec'd notice from Supreme Court; petition for certiorari filed. Supreme Court No. 95-1723; filed on 4/24/96. [94-16137] (jr) [94-16137]
6/20/96	Received notice from Supreme Court, petition for certiorari GRANTED on 6/17/96. Supreme Court No. 95-1723 (ah) [94-16137 94-16214]

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 94-16214 Filed: 7/15/94

Proceedings include all events.
94-16214 Grimmett v. Brown, et al

TOM GRIMMETT, as Trustee for the Bankruptcy Estate of Vincent Siragusa

Plaintiff - Appellant

v.

PATRICIA L. BROWN; PATRICIA L. BROWN, LIMITED, a Nevada Corporation; BECKLEY, SINGLETON, DELANOY, JEMISON & LIST. CHARTERED, a Nevada corporation

Defendants - Appellees

7/15/94	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS due 7/29/94; appellant's designation of RT is due 7/8/94; appellee's designation of RT is due 7/18/94; appellant shall order transcript by 7/28/94; court reporter shall file transcript in DC by 8/29/94,; certificate of record shall be filed by 9/6/94; appellant's opening brief is due 10/14/94; appellees' brief is due 11/14/94; appellants' reply brief is due 11/28/94; [94-16214] (wd) [94-16214]
8/3/94	Filed certificate of record on appeal RT filed in DC N/A [94-16137, 94-16214] (wd) [94-16137 94-16214]
10/15/94	Filed default order for failure to File a "CADS". [94-16214] Response due in fourteen days. [94-16214] (dl) [94-16214]

10/15/94 Received Appellant Tom Grimmett's brief in 15 copies, 35 pages (Informal: NO) deficient: No Excerpts of Record: Served on 10/13/94. (Counsel notified) [94-16214] (response to brief deficiency notice due 10/31/94) (dl) [94-16214]

10/27/94 Received J. Bruce Alverson for Appellant Tom Grimmett in 94-16214 Civil Appeals Docketing Statement, deficient; notified counsel; served on 7/7/94 [94-16214] [94-16214] (ot) [94-16214]

10/27/94 Received Appellant Tom Grimmett in 94-16214 excerpts of record in 01 volumes [94-16214] (ot) [94-16214]

11/2/94 Filed order (Deputy Clerk: cb) Appellant and Appellee Beckley, Singleton, Delanoy, Jemison & List, Chtd., have stipulated to the dismissal with prejudice of this appeal. The named parties shall bear their own costs. Within 14 days from the entry of this order, appellant shall submit excerpts of record along with a motion for relief from default. In the absence of timely compliance with this portion of the order, the appeal shall be dismissed as to the remaining appellee. A new schedule for the remainder of briefing will be established, if appropriate, upon review of the motion for relief from default. A certified copy of this order sent to the district court shall act as and for the mandate of this court as to the above mentioned parties only. [94-16214] (rei) [94-16214]

11/4/94 Filed motion & order: (Deputy Clerk: cb) granting Aplt Grimmett's motion for relief from default. The CADS submitted with the motion shall be filed Nos. 94-16137 and

94-16214 are cons. FRAP 3(b). The Excerpts of Record filed in 94-16137 shall be applied to both appeals. The opening brief rcv in 94-16214 shall be filed. The appellees' brief is now due 12/5/94; record on appeal due 12/12/94; the reply brief due 14 days from svc of aple's brief, in 94-16137 (Motion recvd 10/27/94) [94-16137, 94-16214] (ot) [94-16137 94-16214]

11/4/94 Filed J. Bruce Alverson for Appellant Tom Grimmett in 94-16214 Civil Appeals Docketing Statement served on 7/7/94 (to CONFATT) [94-16214] [94-16214] (ot) [94-16214]

11/4/94 Filed original and 15 copies Appellant Tom Grimmett in 94-16214 opening brief (Informal. no) 35 pages and five excerpts of record in 01 volumes; served on 10/13/94 [94-162141 (ot) [94-16214]

11/9/94 Filed Amended order (Deputy Clerk: cb/pro) Aplt's Grimmett's motion for relief from default is granted. The CADS submitted with the motion shall be filed. Nos. 94-16137 and 94-16214 are cons. FRAP 3(b). Aplt Grimmett has corrected the opening brief's deficiency. The opening brief rcv in 94-16214 shall be filed. The answering brief is now due 12/5/94; record on appeal due 12/12/94; appellants' reply brief is due 14 days from svc of aples brief, in 94-16214 [94-16137, 94-16214] (ot) [94-16137 94-16214]

11/14/94 Filed original and 15 copies appellee Beckley, Singleton in 94-16137's 22 pages brief, ; served on 11/10/94 [94-16137, 94-16214] appellants' reply brief due 11/25/94 in 94-16137, in 94-16214; (ot) [94-16137 94-16214]

11/28/94 Case released from Pre-Briefing Conference program. (crw) [94-15892 94-16039 94-16214 94-16286 94-16540 94-16609 94-16622 94-16730 94-16780 94-16790]

12/1/94 Filed original and 15 copies appellees Patricia L Brown and Patricia L Brown Ltd 28 pages brief, 05 Exc. 01 vols: ; served on 11/14/94 [94-16137, 94-16214] appellants' reply brief due 11/28/94 in 94-16137, in 94-16214; (ot) [94-16137 94-16214]

8/25/95 Calendar check performed [94-16137, 94-16214] (aw) [94-16137 94-16214]

9/28/95 Calendar materials being prepared [94-16137, 94-16214] [94-16137, 94-16214] (mw) [94-16137 94-16214]

10/6/95 CALENDARED: San Francisco Dec. 6, 1995 9:00 a. m. Courtroom 2 ** ctrm changed to Ctrm 3 ** [94-16137, 94-16214] (dd) [94-16137 94-16214]

12/6/95 ARGUED AND SUBMITTED TO James R. BROWNING, William C. CANBY, Cynthia H. HALL [94-16137, 94-16214] (ah) [94-16137 94-16214]

1/26/96 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. James R. BROWNING; William C. CANBY; Cynthia H. HALL, author.) FILED AND ENTERED JUDGMENT. [94-16137, 94-16214] (ot) [94-16137 94-16214]

2/20/96 MANDATE ISSUED [94-16137, 94-16214] (mlm) [94-16137 94-16214]

6/20/96 Received notice from Supreme Court, petition for certiorari GRANTED on 6/17/96. Supreme Court No. 95-1723 (ah) [94-16137 94-16214]

TOM GRIMMETT, ET AL.

Plaintiff

vs.

PATRICIA L. BROWN, ET AL.

Defendant

CIVIL ACTION NO. CV-S-93-1155-PMP (RJJ)

DATE	NR.	PROCEEDINGS
11/24/93	1	COMPLAINT W/Jury Demand obo Ps
–	–	SUMMONS issd to P (3) sml
–	–	JS-5 (AT) sml
–	–	FILING FEES PAID.
12/6/93	2	SUMMONS w/rtrn: Patricia Brown, Lmtd. & Patricia Brown srvd personally on 11/30/93 obo P. jm
12/7/93	3	SUMMONS w/rtrn: Beckley, Singleton; etc. Cht.d srvd personally on 11/30/93. jm
1/3/94	4	ANSWER to cmplnt obo D. Beckley, Singleton & DeLanoy. (m) kc
1/3/94	5	MOTION to dism purs to FRCP 12(b)(6) obo Ds. Brown & Brown Ltd. (m)(AT) kc (DISPO *ERRATA #6, 12 oppo #17, reply #18 grtd* #19
1/4/94	6	ERRATA to mtn to dism purs to FRCP 12(b)(6) obo Ds Brown & Brown Ltd. (m) kc
1/12/94	7	STIPULATION/ORDER (PMP) ORD Ds have to 1/3/94 to answ/resp to cmplnt. Cps dist. (AT) kc

1/18/94	8	FIRST STIPULATION/ORDER (CCF) ORD Ps have to 2/4/94 to resp to mnt to dism (#5), Cps dist. (AT) kc
1/19/94	9	MINUTE ORDER (PMP) ORD cnsl for Ps and Ds have 10 clndr days frm flng date of ord to cmply w/LR 135-5 re cert. of int. ptys. Cps dist. (AT) kc
1/26/94	10	CERTIFICATE rqrd by L/R 135-5 re no other knwn int ptys obo Ds. Borwn & Brown. (m) kc
1/28/94	11	CERTIFICATE purs to L/R 135-5 re no other knwn interested ptys not in case. obo Ps. (m) kc
1/31/94	12	OPPOSITION to mtn to dism (#5) obo Ps. (m) kc fld sep due to size
–	13	EX PARTE APPLICAITON for lve to exceed 30 pgs (#12) obo Ps. kc
2-2-94	–	*Sub #13 TO PMP.nd*
2/2/94	14	EX PARTE APPLICAITON/ORDER (PMP) ORD oppo to Patricia Brown's mtn to dism may exceed 30 pgs. Cps dist. (AT) kc
2/10/94	15	VERIFIED PETITION (PMP) obo David Smith for P. Joanne M. Siragusa. Cps dist. (AT) kc
–	16	DESIGNATION/RESIDENT ATTORNEY (CCF/kc) obo Smith desigs Barry Shinehouse as lcl cnsl for P. Siragusa. Cps dist. (AT) kc
2-25-94	–	*Sub #5, 6 & 12 to PMP.nd*

3/1/94	17	SUPPLEMENTAL OPPOSITION to Mtn to dism. obo Trustee & Joanne Siragusa. (p) efm
3-1-94	–	*Sub #17 to PMP.nd*
3-8-94	18	REPLY to Ps' Oppo. to D, Brown's Mtn to Dism (#5) obo Ds P. Brown & Patricia L. Brown, Lmtd. (p). jm
3-9-94	–	*Sub to PMP #18. Jm*
3/14/94	19	ORDER (PMP) ORD Ds Mtn to dism. #5 grtd. Cps dist EOD 3/14/94 (re Ds. Patricia L. Borwn & Patricia L. Brown, Ltd.
3/17/94	20	MOTION to Dism P's Complaint obo D. B,S,D & Jemison (m) (AT). jm (Dispo: *oppo #23*
3/17/94	21	MOTION for Protective Order obo BK Trustee & Joanne Siragusa (m) (AT) efm (DISPO: *resp. #24 reply #215 #29 grtd*
3/18/94	–	*Sub to RJJ #21. pj*
3/18/94	22	MOTION to reconsid ord dism. claims against Patricia Brown on statute of limitations grounds obo Ps (m) (AT) efm (DISPO: *oppo #27*
3/25/94	23	OPPOSITION to Mtn to dism. #20 obo Ps (m) efm
–	24	RESPONSE to mtn of BK Trustee & Siragusa for prot ord (#21) obo Ds. (m) kc
3/31/94	25	REPLY in support of BK Trustee & Joanne Siragus to mtn for prot ord #21. (m) kc
4/4/94	–	*Sub to RJJ #21, 24, 25. pj*

4/5/94	26	SCHEDULING ORDER (PMP) ORD all pleads and amndmnts to pleads due 6/4/94; disc exp 7/5/94; mtns due 8/19/94. Cps dist. (AT) kc
4/5/94	27	OPPOSITION to mtn to reconsid ord (#22) obo Ds. Brown & Brown, Ltd. (m) kc
4/8/94	28	MINUTE ORDER (RJJ) ORD. tele. conf. call sched 4/12/94 @2pm re #21. FUR ORD. P shall initiate said conf. call. Cps dist. efm
4/12/94	29	MINUTES OF PROCEEDINGS: (RJJ) re #21 (Tape 94-4-51/52) ORD. #21 grtd & subp are quashed. FUR ORD. reasonable costs are awarded to Ps cnsl w/$150.00 awarded to Mr. Nelso's firm $ 535.00 to Mr. Shinehouse's firm. Sacnts are imp against Def. Brown & her cnsl. Cps dist (AT) efm
4/13/94	30	REPLY in support of mtn to recondis (#22) obo Ps. (m) kc
4-15-94	–	*Sub #20, 23, 22, 19, 27 & 30 to PMP.nd*
4/29/94	31	ORDER (PMP) ORD matter plcd on clndr 5/13/94 @ 2 pm for rhgn on Ps' mtn for recondis (#22). Cps dist. (AT) kc
5/13/94	32	MINUTES OF PROCEEDINGS (PMP) (Ct/Rcrd: Jane Bowman) re hrng on Ps' mtn for recondis. #22. ORD matter cont to 5/26/94 @ 3 pm. FUR ORD matter set for hrng on D. Beckley, Singleton's mtn to dism (#20) 5/26/94 @ 3 pm. Cps dist. (AT) kc
5/26/94	33	MINUTES OF PROCEEDINGS (PMP) (Ct/Rcrd: Peggie Vannozzi) re hrng on

		Ps mtn for reconsid #22 & BSD's mtn to dism (#20) Matter taken under sub. Cps dist. (AT) kc
6/1/94	34	ORDER (PMP) ORD P's mtn to reconsid ord dism claims agnst P Brown on Statute of Limitations Grounds (#22) denied. FUR ORD mtn to dism (#20) obo D. Beckley, singleton, et al. grnt'd. EOD 6/2/94. Cps dist. (AT) kc
–	35	JUDGMENT (CCF/kc) Purs to order of the Court, all defendants have been dism frm this action. THEREFORE, JDGMNT ENT in favor of Ds and agnst Ps. EOD 6/2/94. Cps dist. (AT) kc
–	–	JS-6 (AT) kc
6/13/94	36	LETTER dtd 5/18/94 to RJJ fr. Atty B.R. Shinehouse re sancts-paymt have not been received. etc. efm
–	37	LETTER dtd 5/26/94 to RJJ fr. Atty Don F. Shreve, Jr. re sancts. etc
–	38	LETTER (cpy) dtd 5/27/94 to Don F. Shreve fr. B.R. Shinehouse re sancts. etc. efm
6/13/94	–	TRANSCRIPT of hrg re: Ps mtn for reconsideration before PMP, LV,NV on 5/26/94 Ct. Record. Peggie Vannozzi. pa FILED SEPARATELY
6/21/94	39	NOTICE/APPEAL of ord dism Brown, & Brown Ltd. ent. 3/14/94 (#19) and ord & jdgmnt #34 & 35 obo P. Siragusa. (AT) kc
6/22/94	40	CERTIFICATE/MAILING of notc/ appeal obo (Joanne) Siragusa. kc

6/23/94	41	LETTER (cpy) to C/A frm D/C re notc/ appeal; DOCKET FEE NOTIFICATION re D/C & C/A fees pd., Cps dist. w/cpy transcrpt ord forms, cps of dkt. Cpy to C/Rs. (AT) kc
6/28/94	42	NOTICE/APPEAL of ord & jdgmnt (#34 & 35) and order #19 obo P. Tom Grimmett, as Trustee for BK Estates of Vincent Siragusa. (AT) kc
7/5/94	43	LETTER (cpy) to C/A frm D/C/ re notc/appeal; DOCKET FEE NOTIFICATION re D/C & C/A fees unpaid; Cps dist. w/cpy transcrpt ord forms, cps of dkt. Cps to C/Rs. (AT) kc

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TOM GRIMMETT as Trustee for the Bankruptcy Estate of Vincent Siragusa and JOANNE M. SIRAGUSA,	CV-S-93-01155-PMP (RJJ)
Plaintiffs,	
v.	
PATRICIA L. BROWN; PATRICIA L. BROWN, LIMITED, a Nevada Corporation; BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD., a Nevada Corporation; and DOES 1 through 100,	**COMPLAINT WITH JURY DEMAND**
Defendants.	(Filed Nov. 24, 1993)

INTRODUCTION

1. This Complaint (i) alleges, inter alia, violations under (a) The Organized Crime Control Act of 1970, Pub. L. No. 91-452, Section 901(a), 84 Stat. 941, Racketeer Influenced and Corrupt Organizations ("RICO") and (b) The Nevada Racketeering Act, Nevada Revised Statutes 207.350, et seq ("Nevada RICO"), and (ii) is brought by Plaintiffs Tom Grimmett as Trustee for the Bankruptcy Estate of Vincent Siragusa and Joanne M. Siragusa in connection with multiple schemes knowingly, intentionally, willfully and unlawfully devised, conspired, conducted, implemented and/or participated in by, among others, Defendants Patricia L. Brown, Patricia L. Brown, Ltd., and Beckley, Singleton, Delanoy, Jemison & List, Chtd. and Participants Vincent Siragusa; Vincent Siragusa, M.D.; Ltd.; V. Siragusa, M.D., Chartered; Paul Heeren; Paul Heeren, M.D.; Ltd., John A. Bowers; Cardiology Associates of Nevada, John A. Bowers, M.D., Ltd.; Heart Institute of Nevada; Heart Institute Cath Lab; and Heart Institute Property, each of whom (c) through a pattern of racketeering activity acquired and/or maintained, directly or indirectly, an interest in or control of the Heart Institute of Nevada, the Heart Institute Cath Lab, and Heart Institute Property (collectively the "Medical Practice"), aided and abetted in doing so, and/or conspired to do so and (d) was employed by or associated with the Medical Practice to conduct or participate, directly or indirectly, in the conduct of its affairs through a pattern of racketeering activity, aided and abetted in doing so, and/or conspired to do so, all wrongfully and to the detriment of Joanne, the Bankruptcy Estate, and

others. This misconduct by the Defendants and Participants is sometimes referred to for convenience as the "Racketeering Activity".

2. In addition to the federal and Nevada RICO violations, this Complaint further alleges various state law claims for relief for which there is supplemental jurisdiction under The Judicial Improvements Act of 1990, which is codified in 28 U.S.C. 1367. These additional state law claims include without limitation the following legal theories which are expressly identified below. However, the enumeration and express identification of these and any other claims herein is merely provided for the convenience of the this court and the Defendants and does not limit or reduce their respective duties to determine all of the claims for relief which may actually be contained herein based on the subject allegations. The additional state law claims expressly identified below are: (i) Fraud And Conspiracy Against Joanne, (ii) Fraud And Conspiracy Against the Bankruptcy Estate, (ii) Prejudicing/ Defrauding Joanne as a Lien Creditor and Conspiracy, (iv) Intentional Interference With Joanne's Contractual Relations And Conspiracy, (v) Interference With Joanne's Prospective Economic Advantage and Conspiracy, (vi) Intentional Interference With the Bankruptcy Estate's Contractual Relations And Conspiracy, (vii), Conversion and Conspiracy Against Joanne, (viii) Conversion and Conspiracy Against The Bankruptcy Estate, (ix) Conspiracy Against Joanne, and (x) Conspiracy Against the Bankruptcy Estate. These claims are sometimes referred to as the "State Law Tort Claims".

3. The relief sought includes actual damages, punitive damages and treble damages arising from the

schemes and other misconduct alleged herein, together with interest, and fees and costs of investigation and litigation, all as authorized by law.

THE PARTIES

4. Tom Grimmett (the "Trustee") is the duly appointed and acting Trustee in Vincent Siragusa's Chapter 7 Bankruptcy Case which was filed as a voluntary Bankruptcy Petition in case number BK-S-87-3085-LBR in the Bankruptcy Court for the District of Nevada and as such is the fiduciary of Vincent Siragusa's Bankruptcy Estate.

5. Joanne Siragusa ("Joanne") is (i) an individual residing in the state of Nevada and (ii) a creditor of Vincent Siragusa's Bankruptcy Estate with secured claims in excess of $6,000,000.

6. Patricia L. Brown ("Brown") (i) is an individual residing in the State of Nevada and (ii) during all of the Relevant Times defined herein was an attorney duly licensed to practice in the State of Nevada.

7. At certain of the Relevant Times, Patricia L. Brown, Limited ("Brown Ltd") was a Nevada corporation engaged in the practice of law, the sole shareholder, officer and director of which was Brown, but which had no genuine independent existence apart from Brown and therefore was merely Brown's alter ego.

8. The actions of Brown described herein which occurred prior to the following described merger (the "Merger") and affiliation of Brown Ltd and Brown with Beckley, Singleton, DeLanoy, Jemison & List, Chtd. were undertaken by Brown in the scope, course and capacity as

both a principal and agent of, and were ratified, confirmed and adopted by, Brown Ltd.

9. During all of the Relevant Times, Beckley, Singleton, DeLanoy, Jemison & List, Chtd. ("Beckley") was a Nevada corporation engaged in the practice of law in which Brown was at certain of the Relevant Times a shareholder and attorney-employee.

10. Brown Ltd and Brown became merged and affiliated with Beckley on November 1, 1987, which is (i) 10 days before Vincent Siragusa's Bankruptcy Petition was filed, (ii) over one month before Brown submitted her fraudulent Addendum to Statement of Affairs to the Trustee with respect to the Reorganization as later described herein, and (iii) during the period of time that the Reorganization was still being planned, developed and implemented. The Merger and affiliation took the form of (i) a statutory corporate merger supplemented by a written merger agreement between Brown Ltd and Beckley (the "Merger Agreement") and (ii) an employment agreement between Brown and Beckley.

11. The actions and misconduct of Brown with respect to the subject matter of this action which were undertaken by her after her affiliation with Beckley were undertaken by her in the scope, course and capacity as both a principal and agent of, and were ratified, confirmed and adopted by, Beckley.

12. Beckley has also (i) ratified, confirmed, and assumed under Nevada corporate law and in the Merger Agreement, all pre-Merger liabilities of Brown Ltd and (ii) Brown Ltd had previously ratified, confirmed and adopted the actions and misconduct undertaken by

Brown with respect to the subject matter of this action prior to the Merger and Brown's affiliation with Beckley.

13. From June 1983 through and after the filing of the Bankruptcy Petition in November 1987, including especially but without limitation at the time when Brown on behalf of Beckley submitted her Addendum to Statement of Affairs to the Trustee with respect to the Reorganization as later described herein, Brown represented each and all of the Participants as well as the Trustee as an attorney in various legal matters. More specifically, Brown represented:

A. Each and all of the Participants as legal counsel in various matters, including without limitation the Reorganization as later described herein.

B. Vincent Siragusa in connection with his Divorce Proceedings from Joanne as later described herein since June 1983.

C. The Trustee in various other bankruptcy matters not related to Vincent Siragusa's Bankruptcy Case from at least 1985 through and including 1988.

14. Plaintiffs (i) are informed and believe and based thereon allege that other persons and entities whose identities are presently unknown to Plaintiffs are in some manner responsible for the matters alleged herein by (a) devising, conspiring, conducting, implementing, and/or participating in the Racketeering Activity and the State Law Tort Claims and (ii) therefore sue those persons and entities as Defendants Does 1 through 100 and will seek leave of this court to amend this complaint to set forth their precise names and misconduct once ascertained.

15. For convenience, Brown, Brown Ltd, Beckley and any Doe defendants whose identities may subsequently be ascertained are sometimes collectively referred to as the "Defendants".

THE PARTICIPANTS

16. The following persons and entities (the "Participants") participated in the Racketeering Activity to the extent alleged herein but are not named as Defendants for a variety of reasons, including (i) the still pending Bankruptcy Case, (ii) a Bankruptcy Court approved compromise and settlement agreement with certain of the Participants, and (iii) certain of the Participants were (a) unwittingly involved in the Racketeering Activities by Brown the Defendants and (b) themselves victims, all as more particularly described herein.

17. Vincent Siragusa ("Siragusa") (i) is former spouse of Joanne, (ii) is still the debtor in his voluntary Chapter 7 Bankruptcy Case, and (iii) has during all of the Relevant Times been an individual residing in the State of Nevada and a cardiologist licensed in Nevada.

18. During the Relevant Times up to the filing of the Bankruptcy Petition, Vincent Siragusa, M.D., Ltd. ("Siragusa Ltd") was a Nevada corporation engaged in the practice of medicine, the sole shareholder, officer and director of which was Siragusa, but which had no genuine independent existence apart from Siragusa and therefore was merely Siragusa's alter ego.

19. The actions of Siragusa with respect to Siragusa Ltd up to the filing of the Bankruptcy Petition were

undertaken by him in the scope, course and capacity as both a principal and agent of, and were ratified, confirmed and adopted by, Siragusa Ltd.

20. By reason of the misconduct of Defendants Brown and Beckley, and certain of the Participants, Siragusa Ltd was unwittingly made a Participant in the Racketeering Activity but was itself actually a victim thereof.

21. Since the filing of the Bankruptcy Petition, the Trustee has been the sole shareholder, officer and director of Siragusa, Ltd which is property of the Bankruptcy Estate.

22. During the Relevant Times after the filing of the Bankruptcy Petition, V. Siragusa, M.D., Chartered ("Siragusa Chtd") was a Nevada corporation organized to conduct his medical practice, the sole shareholder, officer and director of which was Siragusa, but which had no genuine independent existence apart from Siragusa and therefore was merely Siragusa's alter ego.

23. The actions of Siragusa with respect to Siragusa Chtd after the filing of the Bankruptcy Petition were undertaken by him in the scope, course and capacity as both a principal and agent of, and were ratified, confirmed and adopted by, Siragusa Chtd.

24. Due to the various interrelationships between Siragusa and Siragusa Ltd and Siragusa Chtd corporations, all allegations concerning Siragusa should be deemed to include Siragusa Ltd and/or Siragusa Chtd, as appropriate based on the evidence presented at trial.

25. Paul Heeren ("Heeren") has during all of the Relevant Times been an individual residing in the State of Nevada and a cardiologist licensed in Nevada

26. During the Relevant Times, Paul Heeren, M.D., Ltd. ("Heeren Ltd") was a Nevada corporation engaged in the practice of medicine, the sole shareholder, officer and director of which was Heeren, but which had no genuine independent existence apart from Heeren and therefore was merely Heeren's alter ego.

27. The actions of Heeren described herein were undertaken by him in the scope, course and capacity as both a principal and agent of, and were ratified, confirmed and adopted by, Heeren Ltd.

28. Due to the various interrelationships between Heeren and Heeren Ltd, all allegations concerning Heeren should be deemed to include Heeren Ltd, as appropriate based on the evidence presented at trial.

29. By reason of the misconduct of Defendants Brown and Beckley, and certain of the Participants, Heeren was unwittingly made a Participant in the Racketeering Activity but was himself actually a victim thereof.

30. John A. Bowers ("Bowers") has during all of the Relevant Times been an individual residing in the State of Nevada and a cardiologist licensed in Nevada.

31. From June 2, 1975 through April 1990, Cardiology Associates of Nevada, John A. Bowers, M.D., Ltd. ("CAN") was a Nevada corporation engaged in the practice of medicine, the sole shareholder, officer and director

of which was Bowers, but which had no genuine independent existence apart from Bowers and therefore was merely Bowers' alter ego.

32. During this period, the actions of Bowers described herein were undertaken by him in the scope, course and capacity as both a principal and agent of, and were ratified, confirmed and adopted by, CAN.

33. In April, 1990, Bowers sold 37.5% of the common stock of CAN to three other physicians who were CAN employees for approximately $581,250 and CAN's corporate name was changed to Cardiology Associates of Nevada, Bowers, More, Thomas, Uhl, M.D.'s, Ltd. Bowers subsequently caused CAN to sell additional shares of its common stock to these and other employee physicians through and including November 1991. Beginning in 1992, certain of these physicians requested redemption of their CAN shares pursuant to their various written agreements but CAN and Bowers refused to do so, instead claiming that these CAN shares had no value. These transactions are sometimes collectively referred to as the "CAN Stock Sales" and the employee physicians who purchased this CAN stock are sometimes referred to as the "CAN Junior Owners".

34. From January 1, 1984 through August 1987, Heart Institute of Nevada ("HIN") was a Nevada joint venture (i) engaged in the practice of medicine and (ii) owned one-third each by (a) Bowers and/or CAN, (b) Heeren and/or Heeren Ltd, and (c) Siragusa and/or Siragusa Ltd. Prior to that time, and since July 1, 1980, HIN

conducted the same medical practice with the same ownership under the name of Cardiology Associates Of Nevada until it changed its name to Heart Institute of Nevada. These relationships were established pursuant to written agreements prepared by Defendant Brown (collectively the "HIN Joint Venture Agreement").

35. In August 1987, HIN purported to terminate Siragusa's interest in HIN without any consideration, thereby leaving Bowers and Heeren as HIN's equal owners. In September 1987, (i) HIN purported to cease conducting the practice of medicine and transfer its medical practice to CAN, (ii) HIN changed its name back to Cardiology Associates of Nevada, and (iii) CAN began conducting the same medical practice under the name of Heart Institute of Nevada, all at the same location and with the same equipment and personnel.

36. From October 18, 1983 through August 1987, Heart Institute Cath Lab ("HICL") was a Nevada general partnership (i) that owned and leased cardiology equipment to HIN and (ii) was owned one-third each by (a) Bowers and/or CAN, (b) Heeren and/or Heeren Ltd, and (c) Siragusa and/or Siragusa Ltd.

37. In August 1987, HICL purported to terminate Siragusa's interest in HICL without any consideration, thereby ostensibly leaving Bowers and Heeren as HICL's equal owners. In late 1987, the HICL leases to HIN were purportedly transferred to CAN. In late 1990, Bowers acquired Heeren's interest in HICL and thereafter continued as a proprietorship the HICL equipment leases with CAN.

38. From November 1, 1982 to September 1987, Heart Institute Property ("HIP") was a Nevada general partnership (i) that owned and leased to HIN that real property commonly known as 1059 E. Desert Inn Road, Clark County, Nevada and (ii) was owned 27.55% by Bowers, (ii) 27.55% by Siragusa, (iii) 8.17% by Heeren, and (iv) the balance by various HIN employees.

39. In September 1987, (i) HIP purported to terminate Siragusa's interest in HIP without adequate consideration and (ii) the HIP lease to HIN was purportedly transferred to CAN.

40. For convenience and clarity despite these various entity and name change gyrations, all of the business interests and activities of each and all of HIN, CAN, HICL and HIP are sometimes collectively referred to as the "Medical Practice". Siragusa's interest in the thus constituted Medical Practice is sometimes referred to as "Siragusa's Medical Practice Interest". Heeren's interest in the thus constituted Medical Practice is sometimes referred to as "Heeren's Medical Practice Interest".

41. In June 1992, the Bankruptcy Court, in an adversary proceeding in the Bankruptcy Case involving the various parties and Participants hereto (the "Adversary Proceeding"), approved a compromise and settlement agreement between (i) Joanne and the Trustee on one hand and (ii) Bowers, CAN, HIN, HICL, HIP and the Junior Owners on the other hand, pursuant to which all of the claims between those two groups were resolved in exchange for a payment of approximately $1,400,000 from Bowers, CAN, HIN, HICL, HIP and the Junior Owners (the "HIN Settlement").

THE OTHER VICTIMS

42. In addition to Joanne, the Bankruptcy Estate, Heeren, Heeren Ltd and Siragusa Ltd, the victims of The Racketeering Activity by Defendants Brown and Beckley and the Participants also injured "Other Victims", including the following:

A. Siragusa's Bankruptcy Schedules listed the following Other Bankruptcy Creditors":

Creditors Names	Claim Amount ($)
California Federal	329,128.83
California Federal	20,277.43
First Interstate Bank of Nevada	9,972.00
Heart Institute of Nevada	37,400.00
Valley Bank of Nevada	39,271.23
Ford Motor Credit Co.	18,584.90
Valley Bank of Nevada	5,800.00
Valley Bank of Nevada	158,216.00
Security Bank of Nevada	190,000.00
MDFC Loan Corp.	547,414.00
Leasing Association of Barrington	140,059.00
TOTAL	1,496,123.39

Valley Bank of Nevada is an Other Victim because it has received only $2,500 from the Bankruptcy Estate in compromise of its first two above described creditor's claims totalling approximately $45,000 and thereby suffered a loss of the balance of these claims. (All of the remaining claims of the Other Bankruptcy Creditors have been paid in full outside of the Bankruptcy Estate pursuant to the side agreements in the Reorganization by Siragusa, Bowers, Heeren and/or their respective entities using, at least in part, funds comprising and attributable to the Siragusa Medical Practice Interest which were subject to

the rights of Joanne and the Trustee under, respectively, the Decree of Divorce and the Bankruptcy Code.)

B. The various CAN Junior Owners, who include:

CAN Junior Owners Names	CAN Stock Sale Amount ($)*
Gregory S. Uhl, M.D.**	193,750
Gary D. More, M.D.	193,750
Harry M. Thomas, M.D.	193,750
Matthew J. McMahon, D.O.	193,750
Alan Steljes, M.D.**	35,000
TOTAL	810,000

[*Initial purchase price exclusive of additional capital contributions; **CAN refused redemption request due to purported total lack of value of CAN Stock.]

FEDERAL SUBJECT MATTER JURISDICTION

43. This court has jurisdiction over the claims for relief under 18 U.S.C. 1964(c) (RICO Right to Sue and Treble Damages); 28 U.S.C 1331 (Federal Question); 28 U.S.C. 1337 (Regulation of Commerce); and 28 U.S.C. 1367 (Supplemental Jurisdiction).

44. This complaint also relies in part on Nevada law under the supplemental jurisdiction granted by 28 U.S.C. 1367.

PERSONAL JURISDICTION VENUE

45. Personal jurisdiction and venue are proper in this district based upon 18 U.S.C. 1965(a) and (b) and 28

U.S.C. 1391(b) and (d) as each Defendant resides, has an agent or agents, or transacts business, within this district, and the acts and occurrences in furtherance of the claims alleged herein primarily arose in this district, and the ends of justice require that any other parties residing in other districts be brought before this court.

THE DIVORCE PROCEEDINGS

46. Joanne and Vincent Siragusa as spouses entered into a Property Settlement Agreement which was subsequently incorporated and merged into a Decree of Divorce entered by the Nevada Eighth Judicial District Court (the "Divorce Court") in Case No. D58232 (the "Divorce Proceedings") on September 23, 1983 at which time:

A. Siragusa was a cardiologist who has been described by his own expert witnesses in the Divorce Proceedings as:

> [O]ne of the heaviest producing cardiologists in my experience. I would rate him as being one of the top three producing cardiologists in Clark County, Nevada, and in the top 5 per cent nationally.

B. All of the assets of Joanne and Siragusa (the "Marital Assets") were community property as all of the Marital Assets had been acquired during their approximately 17 year marriage after Joanne had supported Siragusa through medical school as a school teacher and they moved to Nevada.

C. Substantially all of the value of the Marital Assets was contained in Siragusa's Medical Practice Interest.

D. Siragusa owed Joanne a fiduciary duty to fully disclose to and deal fairly with Joanne in connection with their Marital Assets.

47. Under the Decree of Divorce, Joanne essentially promised to release her one-half community property interest in Siragusa's Medical Practice Interest in exchange for the following series of secured deferred payments (the "Marital Payments") by Siragusa to Joanne:

> 2. The parties acknowledge and agree that Wife is granting Husband substantial concessions in so deferring the actual receipt of property comprising her one-half (1/2) interest in the community property of the parties and that in exchange therefor Husband expressly agrees, inter alia, that:
>
> * * *
>
> b. Husband shall and hereby does grant Wife an equitable lien against each and all of the property comprising and relating to his professional medical practice and related real, personal and intangible assets and entities utilized in connection therewith together with all accessions thereto for the purpose of securing each and all of his obligations hereunder, agrees to execute such commercially reasonable security instruments in connection therewith as counsel for Wife may from time to time request, and acknowledges understanding that this lien shall be judicially imposed upon merger of this

Agreement in a subsequently obtained decree of divorce. (At page 10.)

48. On February 29, 1984, Joanne and Siragusa executed a Security Agreement and UCC-1 Filings pursuant to the Decree of Divorce to secure the Marital Payments and all of Siragusa's other obligations to Joanne under the Decree of Divorce with a lien under Nevada Uniform Commercial Code Article 9 against all of Siragusa's Medical Practice Interest (the "Lien"), including without limitation all additions and accessions thereto and all proceeds of disposition thereof. The UCC-1 Filings were duly filed with the Nevada Secretary of State and the Clark County, Nevada Recorder on March 5, 1984. For convenience, the Security Agreement, the UCC-1 Filings, and the Property Settlement Agreement are hereinafter collectively referred to as the "Decree of Divorce".

THE RELEVANT TIMES

49. The "Relevant Times" for purposes of the Racketeering Activity described herein are from (i) around November 1986 when Brown first began to plan the Reorganization as later described herein, through (ii) the Fall of 1987 when Brown and Beckley further devised, conspired, conducted, implemented and/or participated in the Reorganization, (iii) November 10, 1987 when Siragusa's Bankruptcy Petition was filed, (iv) April 1990 to November 1991 when the CAN Stock Sales were made, (v) late 1992 when the CAN Stock Sale redemptions were refused, and (vi) the filing of this complaint as the Obstruction of Justice described herein is still continuing and the resulting damages are still continuing to accrue.

The "Relevant Times" for purposes of the State Law Tort Claims described herein are from around June 1983 when Brown first began to counsel, conspire with, and aid and abet Siragusa with respect to his Divorce Proceedings and the misconduct relating thereto, through the Relevant Times for the Racketeering Activity.

THE ENTERPRISE

50. The "Enterprise" for purposes of the Racketeering Activity described herein is the Medical Practice which is an association in fact enterprise within the meaning of 18 U.S.C. 1961(4) consisting of its various component entities, including primarily but without limitation HIN, CAN, HICL and HIP the activities of which at its primary 1090 E. Desert Inn Road, Clark County, Nevada location and all of its locations within and outside of the State of Nevada engaged in and affected interstate commerce during the Relevant Times.

51. This Enterprise (i) constitutes an ongoing organization with a decision-making structure, (ii) is comprised of various associates and entities which function as a continuing unit, such that each performs a role consistent with the organizational structure and furthers the activities of the organization, and (iii) has an existence beyond that which is necessary to commit each of the Racketeering Activities.

THE RACKETEERING ACTIVITY

Summary Of The Various Fraudulent Schemes

52. During the Relevant Times, Defendants Brown and Beckley, and Participants Bowers, CAN and Siragusa (along with the other Participants a d currently unknown Doe Defendants) knowingly, intentionally, willfully and unlawfully devised, conspired, conducted, implemented and/or participated in multiple fraudulent schemes (the "Schemes") through the Racketeering Activity to obtain the lucrative financial rewards of the Medical Practice Enterprise (the "Goal") at the expense and to the detriment of Joanne, the Bankruptcy Estate and the Other Victims.

53. Participants Siragusa, Bowers and CAN accomplished the Goal in part by acquiring and maintaining (i) the Siragusa and Heeren Medical Practice Interests and (ii) control of the Medical Practice Enterprise through the Racketeering Activity in which the Defendants Brown and Beckley aided and abetted.

54. Participants Siragusa, Bowers and CAN and Defendants Brown and Beckley further accomplished the Goal by conducting or participating in the conduct of the Medical Practice Enterprise through the Racketeering Activity.

55. This enabled Siragusa to obtain a significant portion of the substantial operating profits and distributions of the Medical Practice attributable to Siragusa's Medical Practice Interest to which Joanne and the Trustee were properly entitled.

56. This further enabled Bowers and CAN to obtain (i) the rest of the substantial profits and distributions of the Medical Practice (the "Profits") attributable to the Medical Practice Interest of Siragusa to which Joanne and the Trustee were properly entitled, (ii) a significant portion of the Profits attributable to the Medical Practice Interest of Heeren and (iii) additional substantial funds from the CAN Stock Sales.

57. Defendants Brown and Beckley and Participants Siragusa, Bowers and CAN (along with the various other Participants and the currently unknown Doe Defendants) used the following Racketeering Activity since 1986 to accomplish the Goal of the Schemes:

A. The purported termination of Siragusa's Medical Practice Interest (the "Siragusa Termination"), which was intended to destroy (i) Joanne's rights therein under the Decree of Divorce and (ii) the Bankruptcy Estate's property rights therein under the Bankruptcy Code.

B. The purported transfer of HIN's medical practice to CAN (the "HIN Dissolution"), which was intended to ostensibly destroy HIN's medical practice and the interest of Siragusa and Heeren therein in order to (i) make the Siragusa Termination look "legitimate" to Joanne and the Trustee and (ii) carry out the following described Fraud Upon Heeren.

C. Siragusa's Bankruptcy Petition, which was based on the fraudulent Siragusa Termination and HIN Dissolution and intended to further discourage Joanne from pursuing her rights in Siragusa's Medical Practice Interest under the Decree of Divorce.

D. Affirmatively providing the Trustee and Joanne with backdated and otherwise fraudulent documents and information (the "False Information") in support of Siragusa's Bankruptcy Petition relating to the Siragusa and Heeren Medical Practice Interests, including the Siragusa Termination and the HIN Dissolution, which was intended to discourage (i) the Trustee from pursuing the Bankruptcy Estate's property rights in Siragusa's Medical Practice Interest under the Bankruptcy Code and (ii) Joanne from pursuing her rights therein.

E. Falsely assuring Heeren that (i) the Siragusa Termination, the HIN Dissolution, the Bankruptcy Petition, and the False Information (which are collectively the primary steps in the Reorganization as later described more fully) were all necessary and appropriate to protect the Medical Practice from harm by Joanne and the Trustee and (ii) no adverse economic or other consequences would result to Heeren's own ownership interests in the Medical Practice from following those steps. This was intended to fraudulently induce Heeren's participation in the Reorganization and defraud him out of his own HIN Medical Practice Interest (the "Fraud Upon Heeren").

F. Falsely assuring the CAN Junior Owners as to (i) the maximum exposure to the CAN medical practice from the Adversary Proceeding by Plaintiffs and the separate litigation by Heeren with respect to the Reorganization and (ii) the CAN Junior Owners' subsequent redemption rights, all to fraudulently induce the CAN Stock Sales (the "Fraud Upon The CAN Junior Owners").

G. Further destroying documents and otherwise concealing assets and information from, and providing false responsive testimony to, Joanne and the Trustee throughout the Bankruptcy Case and the Adversary Proceeding and making other false filings therein (as well as in the Divorce Proceedings), all to defraud Joanne, the Trustee, the Bankruptcy Estate, the Bankruptcy Court and the Divorce Court in order to carry out the other Schemes described herein. This misconduct is still continuing through and including the filing of this complaint (the "Obstruction of Justice").

58. More specifically regarding the Reorganization:

A. Defendants Brown and Beckley and the Participants devised and implemented the following fraudulent acts: (i) Siragusa's Medical Practice Interest was purportedly amended, defaulted and terminated for virtually no consideration by the Siragusa Termination, (ii) the HIN medical practice was purportedly dissolved and transferred to CAN without consideration by the HIN Dissolution, (iii) Siragusa purportedly ceased to be an owner of his Medical Practice Interest and became a mere "employee" under side agreements which were equal to his prior share of Profits, (iv) Heeren purportedly ceased to be an owner of his HIN Medical Practice Interest and became a mere "employee" under side agreements which were equal to his prior share of Profits, and (v) Siragusa filed his fraudulent Bankruptcy Petition, Brown and Beckley's fraudulent Addendum, and other fraudulent supporting materials in his Bankruptcy Case.

B. However, the Siragusa Termination and HIN Dissolution never actually took place in a proper and

legitimate manner and were never intended to have actual effect, but rather these purported transactions were part of a series of sham transactions supported by fraudulent documents which had been backdated to coordinate Siragusa's purported Termination and HIN's purported Dissolution with the filing of Siragusa's Bankruptcy Petition without adequate consideration and subject to contrary side agreements, all intended to (i) create the false impression that these events (a) had actually taken place at an earlier time when in fact they had not taken place earlier, or at all, and (b) were actually being given full effect by the parties thereto when in fact they were not and (ii) conceal the true contrary status of Siragusa's Medical Practice Interest.

C. The true purpose of the Reorganization was to (i) discourage Joanne and the Trustee from pursuing their respective rights in Siragusa's Medical Practice Interest and (ii) accomplish the Goal.

59. The fraudulent nature of the Reorganization activities by Defendants Brown and Beckley and the Participants are candidly described from the insider-participant perspective of Heeren and his wife, Carol Heeren, in Heeren's December 28, 1990 Affidavit Re Reorganization and their related deposition testimony, which in part provided as follows in numbered paragraph 8:

> 8. The Reorganization information which Mrs. Brown presented to the trustee in the Brown Trustee Memo was a sham and a farce inasmuch as neither Dr. Bowers nor I ever agreed to actually terminate our interests in the Partnerships. To the contrary, the terminations and other changes in the relationships of the

partners resulting from the Reorganization were designed and intended to be mere "paper transactions" for the express purpose of protecting the Partnerships from harm by Joanne Siragusa's divorce claims against Dr. Siragusa. It was expressly discussed, understood and agreed among Dr. Bowers, Dr. Siragusa, Mrs. Brown and me that notwithstanding the Reorganization documents (some of which were backdated) (i) all of the pre-existing ownership interests of Dr. Bowers and me in the Partnerships would be fully and completely restored once Ms. Siragusa's divorce claims had been resolved, (ii) all of the pre-existing ownership interests of Dr. Siragusa would also be fully and completely restored as soon as "legally possible", and (iii) the pre-existing division of Partnership profits during the interim would be maintained by various employment contracts (collectively the "Side Agreements").

60. The various Schemes were carried out by Defendants Brown and Beckley and Participants Siragusa, Bowers and CAN knowingly, intentionally, willfully and unlawfully over the Relevant Times through the Racketeering Activity which consisted of a complex pattern of individual transactions and groups of transactions. These Schemes and the Racketeering Activity involved in each are summarized as follows before setting them forth in detail:

A. **The Scheme To Fraudulently Acquire And Maintain Siragusa's Medical Practice Interest:** In this Scheme, Defendants Brown and Beckley, and Participants Siragusa, Bowers and CAN (along with the various other Participants and the currently unknown Doe Defendants)

devised and implemented a plan to defraud Joanne and the Trustee out of their respective rights in Siragusa's Medical Practice Interest. This Scheme involved the use of the Reorganization (including primarily the Siragusa Termination, the HIN Dissolution, the Bankruptcy Petition, and the False Information), and the Obstruction of Justice to (i) first acquire and then maintain Siragusa's Medical Practice Interest and the control of the Enterprise resulting therefrom and (ii) conduct the Medical Practice Enterprise, subject to side agreements to (a) maintain Siragusa's Medical Practice Interest sub rosa for his future benefit and restore it to him when "legally possible" to do so and (b) distribute to Siragusa the same equal share of Profits from his Medical Practice Interest under the guise of employment contracts. This Scheme included an extensive series of separate violations of the following federal and Nevada state laws:

(1) Violations of federal laws which constitute "racketeering activity" under 18 U.S.C. 1961(1):

(a) Bankruptcy fraud under 18 U.S.C. 152. See attached Exhibit "1" for a list of specific such acts.

(b) Mail fraud under 18 U.S.C. 1341. See attached Exhibit "2" for a list of specific such acts.

(c) Wire fraud under 18 U.S.C. 1343. See attached Exhibit "3" for a list of specific such acts.

(d) Obstruction of justice under 18 U.S.C. 1503. See attached Exhibit "4" for a list of specific such acts.

2. Violations of Nevada state laws which constitute "crimes related to racketeering" under NRS 207.360:

(a) Grand larceny in violation of N.R.S. 207.360(16) and 205.220. See attached Exhibit "1" for a list of specific such acts.

(b) Embezzlement in violation of N.R.S. 207.360(25) and 205.300. See attached Exhibit "1" for a list of specific such acts.

(c) Obtaining money or property by false pretenses in violation of N.R.S. 207.360(26) and 205.380. See attached Exhibit "1" for a list of specific such acts.

(d) Perjury or subornation of perjury in violation of N.R.S. 207.360(27) and 199.200. See attached Exhibit "4" for a list of specific such acts.

(e) Offering false evidence in violation of N.R.S. 207.360(28) and 199.210. See attached Exhibit "4" for a list of specific such acts.

B. **The Scheme To Fraudulently Acquire And Maintain Heeren's HIN Medical Practice Interest:** In this Scheme, Defendants Brown and Beckley, and Participants Bowers and CAN (along with the various other Participants besides Heeren and the currently unknown Doe Defendants) devised and implemented a plan to defraud Heeren out of his Medical Practice Interest in HIN. This Scheme involved the use of the Reorganization (including primarily the Siragusa Termination, the HIN Dissolution, the Bankruptcy Petition, and the False Information), the Fraud Upon Heeren, and the Obstruction of Justice to (i) first acquire and then maintain Heeren's HIN Medical Practice Interest and the control of the Enterprise resulting therefrom and (ii) conduct the Medical Practice Enterprise, subject to side agreements to (a) maintain Heeren's

HIN Medical Practice Interest sub rosa for his future benefit and restore it to him when "legally possible" to do so and (b) distribute to Heeren the same equal share of Profits from his Medical Practice Interest under the guise of employment contracts. This Scheme included an extensive series of separate violations of the following federal and Nevada state laws:

1. Violations of federal laws which constitute "racketeering activity" under 18 U.S.C. 1961(1):

(a) Bankruptcy fraud under 18 U.S.C. 152. See attached Exhibit "1" for a list of specific such acts.

(b) Mail fraud under 18 U.S.C. 1341. See attached Exhibit "2" for a list of specific such acts.

(c) Wire fraud under 18 U.S.C. 1343. See attached Exhibit "3" for a list of specific such acts.

(d) Obstruction of justice under 18 U.S.C. 1503. See attached Exhibit "4" for a list of specific such acts.

(e) Fraud in the sale of securities under (i) Sections 12(2), 15 and 17 of the Securities Act of 1933, as amended, (ii) Sections 10(b) and 20 of the Securities Exchange Act, of 1934, as amended, and (iii) Securities and Exchange Commission Rule 10-b5, 17 CFR 240.10b-5 (1991). See attached Exhibit "5" for a list of specific such acts.

2. Violations of Nevada state laws which constitute "crimes related to racketeering" under NRS 207.360:

(a) Grand larceny in violation of N.R.S. 207.360(16) and 205.220. See attached Exhibit "1" for a list of specific such acts.

(b) Embezzlement in violation of N.R.S. 207.360(25) and 205.300. See attached Exhibit "1" for a list of specific such acts.

(c) Obtaining money or property by false pretenses in violation of N.R.S. 207.360(26) and 205.380. See attached Exhibit "1" for a list of specific such acts.

(d) Perjury or subornation of perjury in violation of N.R.S. 207.360(27) and 199.200. See attached Exhibit "4" for a list of specific such acts.

(e) Offering false evidence in violation of N.R.S. 207.360(28) and 199.210. See attached Exhibit "4" for a list of specific such acts.

(f) Securities fraud in violation of N.R.S. 207.360(30) and 90.570. See attached Exhibit "5" for a list of specific such acts.

C. **The CAN Stock Sales Scheme:** In this Scheme, Defendants Brown and Beckley, and Participants Bowers and CAN (along with the various other Participants besides Heeren and the currently unknown Doe Defendants) devised and implemented a plan to defraud the CAN Junior Owners through the CAN Stock Sales. This Scheme primarily involved the use of the Fraud Upon The CAN Junior Owners, the filing of Siragusa's Bankruptcy Petition and the False Information with respect thereto, and the Obstruction of Justice to (i) maintain Bower's Medical Practice Interest and his control over the Medical Practice Enterprise and (ii) conduct the

Enterprise for his further benefit. This Scheme included an extensive series of separate violations of the following federal and Nevada state laws:

1. Violations of federal laws which constitute "racketeering activity" under 18 U.S.C. 1961(1):

(a) Bankruptcy fraud under 18 U.S.C. 152. See attached Exhibit "1" for a list of specific such acts.

(b) Mail fraud under 18 U.S.C. 1341. See attached Exhibit "2" for a list of specific such acts.

(c) Wire fraud under 18 U.S.C. 1343. See attached Exhibit "3" for a list of specific such acts.

(d) Obstruction of justice under 18 U.S.C. 1503. See attached Exhibit "4" for a list of specific such acts.

(e) Fraud in the sale of securities under (i) Sections 12(2), 15 and 17 of the Securities Act of 1933, as amended, (ii) Sections 10(b) and 20 of the Securities Exchange Act of 1934, as amended, and (iii) Securities and Exchange Commission Rule 10-b5, 17 CFR 240.10b-5 (1991). See attached Exhibit "5" for a list of specific such acts.

2. Violations of Nevada state laws which constitute "crimes related to racketeering" under NRS 207.360:

(a) Grand larceny in violation of N.R.S. 207.360(16) and 205.220. See attached Exhibit "1" for a list of specific such acts.

(b) Embezzlement in violation of N.R.S. 207.360(25) and 205.300. See attached Exhibit "1" for a list of specific such acts.

(c) Obtaining money or property by false pretenses in violation of N.R.S. 207.360(26) and 205.380. See attached Exhibit "1" for a list of specific such acts.

(d) Perjury or subornation of perjury in violation of N.R.S. 207.360(27) and 199.200. See attached Exhibit "4" for a list of specific such acts.

(e) Offering false evidence in violation of N.R.S. 207.360(28) and 199.210. See attached Exhibit "4" for a list of specific such acts.

(f) Securities fraud in violation of N.R.S. 207.360(30) and 90.570. See attached Exhibit "5" for a list of specific such acts.

D. **The Scheme To Obstruct Justice:** In this Scheme, Defendants Brown and Beckley, and Participants Bowers and CAN (along with the various other Participants and the currently unknown Doe Defendants) devised and implemented a plan to defraud Joanne, the Trustee, the Bankruptcy Estate, the Bankruptcy Court and the Divorce Court in order to carry out the other Schemes described herein. This Scheme involved the use of fraudulent filings in the Divorce Court, the fraudulent Bankruptcy Petition, and Defendants Brown and Beckley's Addendum to Statement of Affairs and the other False Information, and was expanded to include numerous acts of perjury, fabrication of false documents, and destruction of documents when the Bankruptcy Petition and the False Information were challenged by Joanne and the Trustee, all to (i) fraudulently acquire and maintain Siragusa's and Heeren's HIN Medical Practice Interest and the control of the Enterprise resulting therefrom and (ii) fraudulently conduct the Medical Practice Enterprise to

the detriment of Joanne, the Bankruptcy Estate and the other Victims. This Scheme included an extensive series of separate violations of the following federal and Nevada state laws:

1. Violations of federal laws which constitute "racketeering activity" under 18 U.S.C. 1961(1):

(a) Bankruptcy fraud under 18 U.S.C. 152. See attached Exhibit "1" for a list of specific such acts.

(b) Mail fraud under 18 U.S.C. 1341. See attached Exhibit "2" for a list of specific such acts.

(c) Wire fraud under 18 U.S.C. 1343. See attached Exhibit "3" for a list of specific such acts.

(d) Obstruction of justice under 18 U.S.C. 1503. See attached Exhibit "4" for a list of specific such acts.

(e) Fraud in the sale of securities under (i) Sections 12(2), 15 and 17 of the Securities Act of 1933, as amended, (ii) Sections 10(b) and 20 of the Securities Exchange Act of 1934, as amended, and (iii) Securities and Exchange Commission Rule 10-b5, 17 CFR 240.10b-5 (1991). See attached Exhibit "5" for a list of specific such acts.

2. Violations of Nevada state laws which constitute "crimes related to racketeering" under NRS 207.360:

(a) Grand larceny in violation of N.R.S. 207.360(16) and 205.220. See attached Exhibit "1" for a list of specific such acts.

(b) Embezzlement in violation of N.R.S. 207.360(25) and 205.300. See attached Exhibit "1" for a list of specific such acts.

(c) Obtaining money or property by false pretenses in violation of N.R.S. 207.360(26) and 205.380. See attached Exhibit "1" for a list of specific such acts.

(d) Perjury or subornation of perjury in violation of N.R.S. 207.360(27) and 199.200. See attached Exhibit "4" for a list of specific such acts.

(e) Offering false evidence in violation of N.R.S. 207.360(28) and 199.210. See attached Exhibit "4" for a list of specific such acts.

(f) Securities fraud in violation of N.R.S. 207.360(30) and 90.570. See attached Exhibit "5" for a list of specific such acts.

61. These Schemes inflicted discrete harms on each of their Victims, including Joanne, the Bankruptcy Estate, the Other Bankruptcy Creditors, Heeren and the CAN Junior Owners. The losses suffered by each of the Victims are summarized as follows:

A. Losses by Joanne: The resulting (i) loss of the rights in Siragusa's Medical Practice Interest, including especially but without limitation (a) the share of the substantial Profits properly attributable to that Medical Practice Interest, (b) the ability to sell that Medical Practice Interest at its fair market value and (c) interest thereon, and (ii) the fees and costs of investigation and litigation, all for the Relevant Times until trial of this matter and full payment thereof.

B. Losses by Trustee: The resulting (i) loss of the Bankruptcy Estate's rights under the Bankruptcy Code in Siragusa's Medical Practice Interest, including especially but without limitation (a) the share of the substantial Profits properly attributable to that Medical Practice Interest, (b) the ability to sell that Medical Practice Interest at its fair market value and (c) interest thereon, and (ii) the fees and costs of investigation and litigation, all for the Relevant Times until trial of this matter and full payment thereof.

C. Losses by Heeren: Similar types of losses, fees and costs with respect to his own Medical Practice Interest, including especially with respect to his shares of (i) the various Profits taken by Bowers from the Medical Practice and (ii) the CAN Stock Sale proceeds.

D. Losses by the Other Bankruptcy Creditors: Valley Bank of Nevada has received only $2,500 from the Bankruptcy Estate in compromise of its two above described creditor's claims totalling approximately $45,000 and thereby suffered a loss of the balance of these claims. However, all of the remaining claims of the Other Bankruptcy Creditors have been paid in full outside of the Bankruptcy Estate pursuant to the side agreements in the Reorganization by Siragusa, Bowers, Heeren and/or their respective entities using, at least in part, funds comprising and attributable to Siragusa's Medical Practice Interest which were subject to the rights of Joanne and the Trustee under, respectively, the Decree of Divorce and the Bankruptcy Code.

E. Losses by the Junior CAN Owners: The amounts of funds paid by the CAN Junior Owners in the

fraudulent sale of the CAN Stock is as follows and the CAN Junior Owners who have been refused redemption are:

CAN Junior Owners Names	CAN Stock Sale Amount ($)*
Gregory S. Uhl, M.D.**	193,750
Gary D. More, M.D.	193,750
Harry M. Thomas, M.D.	193,750
Matthew J. McMahon, D.O.	193,750
Alan Steljes, M.D.**	35,000
TOTAL	810,000

[*Initial purchase price exclusive of additional capital contributions; **CAN refused redemption request due to purported total lack of value of CAN Stock.]

The Scheme To Fraudulently Acquire And Maintain Siragusa's Medical Practice Interest

62. The Scheme to acquire and maintain Siragusa's Medical Practice Interest can be best understood in the context of some additional background regarding the Divorce Proceedings and additional details regarding the Reorganization.

63. In the Divorce Proceedings:

A. Siragusa repeatedly and willfully failed and refused to make the Marital Payments or perform his other obligations under the Decree of Divorce even though he could have readily done so at all Relevant Times. As noted above, virtually all of the claims of Siragusa's Other Creditors were paid in full outside of the Bankruptcy Estate pursuant to the Reorganization

side agreements using, at least in part, funds attributable to Siragusa's Medical Practice Interest

B. Siragusa never intended to make the Marital Payments or perform his other obligations under the Decree of Divorce.

C. Rather, Siragusa undertook a fraudulent and deceptive course of conduct (the "Fraudulent Course of Conduct") (i) initially designed to defraud Joanne out of her legitimate rights and interests under the Decree of Divorce, and (ii) which was expanded by Defendants Brown and Beckley and the various Participants into the Reorganization and the other Racketeering Activity described herein.

64. At all times since before the Divorce Proceedings, including before, when and after the Property Settlement Agreement and the Security Agreement were each executed through and until August 1987 after Joanne had commenced steps to enforce Marital Payment arrearages (the "Arrearages Motion") in July 1987, Siragusa represented to Joanne that Bowers, Heeren and the Medical Practice Enterprise (i) were fully aware of the existence and terms of the Decree of Divorce, including Joanne's Lien, (ii) had no objection to those provisions, and (iii) had taken all steps required to consent thereto to the extent necessary.

65. Bowers, Heeren, the Medical Practice Enterprise, and Brown (i) in fact had full knowledge of the Lien provisions of the Property Settlement Agreement and the Security Agreement before, when and after they were executed and (ii) did not inform Joanne of any objections thereto until June 1987.

66. Defendants Brown and Beckley and the Participants in concert knowingly, intentionally, willfully and unlawfully (i) devised a common plan and design to carry out the Fraudulent Course of Conduct, including the Reorganization and the other Racketeering Activity described herein, (collectively the "Conspiracy") and (ii) actively conducted, implemented, participated in, aided, abetted, ratified and adopted for their own improper purposes the actions of the others in the Conspiracy in furtherance thereof, all:

A. With a malicious intent to harm Joanne and the Bankruptcy Estate.

B. By unlawful means to accomplish the goal of the Conspiracy.

C. Utilizing the force of the number of members of the Conspiracy as well as their vastly superior financial resources.

67. The so-called Reorganization consisted of a series of sham transactions supported by fraudulent documents which had been backdated to coordinate the Siragusa Termination and HIN Dissolution with the filing of Siragusa's Bankruptcy Petition without adequate consideration and subject to contrary side agreements. These sham transactions were fraudulently presented to the Trustee (and Joanne) as true and correct by Defendants Brown and Beckley in their Addendum to Statement of Affairs in which they expressly undertook to "explain the history and nature of the Heart Institute of Nevada, and Dr. Siragusa's participation therein."

68. The Fraudulent Course of Conduct comprising the Conspiracy includes without limitation:

A. The "Pre-Reorganization Period" from prior to execution of the Property Settlement Agreement in 1983 through approximately November 1986, during which Siragusa: (i) entered into that Agreement, (ii) repeatedly and willfully failed and refused to make the Marital Payments or perform his other obligations under the Decree of Divorce even though he could have readily done so, and (iii) made numerous false representations to Joanne to defraud her out of the Marital Payments and all other rights and interests to which Joanne was properly entitled under the Decree of Divorce. Brown acted as Siragusa's attorney in connection with various matters related to his Divorce Proceedings and conspired with and aided and abetted Siragusa with respect thereto from at least June 1983.

B. The "Reorganization Period" from approximately November 1986 primarily through the filing of Siragusa's Bankruptcy Petition on November 10, 1987, during which period Defendants Brown and Beckley and the Participants devised, conspired, conducted, implemented and/or participated in the following acts which are sometimes collectively referred to as the Reorganization: (i) Siragusa's Medical Practice Interest was purportedly amended, defaulted and terminated for virtually no consideration by the Siragusa Termination, (ii) the HIN medical practice was purportedly dissolved and transferred to CAN without consideration by the HIN Dissolution, (iii) Siragusa purportedly ceased to be an owner of his Medical Practice Interest and became a mere

"employee" under side agreements which were admittedly equal to his prior share of Profits, and (iv) Siragusa filed his Bankruptcy Petition.

C. The "Bankruptcy Period" from the filing of Siragusa's Bankruptcy Petition on November 10, 1987 through and including the present, during which period Defendants Brown and Beckley and the Participants: (i) filed Siragusa's Bankruptcy Petition to prevent Joanne from exercising her legitimate rights in Siragusa's Medical Practice Interest and (ii) made numerous false representations (a) to Joanne to further the fraudulent Scheme upon her, (b) to the Trustee to defraud the Bankruptcy Estate out of its rights in Siragusa's Medical Practice Interest, including without limitation through Siragusa's Bankruptcy Petition, Schedules and Statement of Affairs and Defendants Brown and Beckley's Addendum to Statement of Affairs, and (c) to both Joanne and the Trustee to Obstruct Justice with respect to these matters.

69. In December 1990 when Heeren provided his Affidavit Re Reorganization, the Trustee (and Joanne) discovered (i) the fraudulent nature of Defendants Brown and Beckley's Addendum to Statement of Affairs and the other False Information which the Defendants and Participants had provided to the Trustee (and Joanne) and (ii) the key role which Defendants Brown and Beckley had in planning and implementing the fraudulent Reorganization and Conspiracy. This False Information was part of the Obstruction of Justice in which Defendants Brown and Beckley and certain of the Participants further destroyed documents and otherwise concealed assets and information from, and provided false responsive testimony and other information to, Joanne and the Trustee

throughout the Bankruptcy Case and the Adversary Proceeding (and the Divorce Proceedings).

70. During the Relevant Times, including especially but without limitation at the times when Defendants Brown and Beckley submitted the Addendum to Statement of Affairs to the Trustee and otherwise Obstructed Justice, Defendants Brown and (from at least November 1, 1987) Beckley owed the Trustee a duty to fully disclose to, and not conceal from, the Trustee the assets and information relating to the Bankruptcy Estate (i) as Defendants Brown and (from at least November 1, 1987) Beckley was the Trustee's own attorney in other bankruptcy matters (at least during some of those times) and (ii) under the Bankruptcy Code and other applicable laws, including especially but without limitation 18 U.S.C. 152 relating to bankruptcy crimes.

71. These duties also extended to Joanne to the extent she was acting ex rel the Trustee in the Bankruptcy Case and Adversary Proceeding pursuant to the Bankruptcy Court's order authorizing Joanne to bring claims for relief for the benefit of the Bankruptcy Estate.

72. During these Relevant Times, Defendants Brown and Beckley and the Participants (besides Siragusa Ltd) each owed fiduciary duties to Siragusa Ltd as its attorney, officer, director, shareholder, and/or partner as appropriate to the precise status of each Defendant and Participant.

Fraud As To Joanne

73. During the Relevant Times, Joanne had the above-described rights under the Decree of Divorce, including without limitation her Lien against Siragusa's Medical Practice Interest.

74. Defendants Brown and Beckley and the Participants engaged in the Conspiracy, including the Reorganization and the other Racketeering Activity, in part by making numerous false material representations to Joanne (the "False Joanne Representations").

75. Siragusa made many False Joanne Representations, including but not limited to:

A. During the Pre-Reorganization Period:

(1) Prior to entering into the Decree of Divorce, Siragusa represented that he would (i) make the Marital Payments and perform the other obligations required of him thereunder and (ii) honor the Lien and hold and use his Medical Practice Interest as collateral under the Lien.

(2) Subsequent to entering into the Decree of Divorce, Siragusa represented that the financial condition of the Medical Practice had become so bad that Siragusa was himself in such poor financial condition that he could not possibly make the required Marital Payments, which misrepresentations Siragusa has continued throughout the Reorganization and Bankruptcy Periods.

B. During the Reorganization Period:

(1) After the time when Siragusa lost his efforts to defend Joanne's Marital Payment Arrearages

Motion, Siragusa represented that his Medical Practice Interest had previously been terminated months before by the Reorganization, even though up to the time when Siragusa lost Joanne's Marital Payment Arrearages Motion Siragusa had represented to the court in the Divorce Proceedings that his Medical Practice Interest were then still existing.

(2) Siragusa represented that after his purported Termination from the Medical Practice, he was no longer an owner but merely an "employee" thereof.

C. During the Bankruptcy Period: Siragusa filed his Bankruptcy Petition and Schedules and Statement of Affairs which made the fraudulent assertion that (i) Siragusa no longer owned any of his Medical Practice Interest and had merely become an "employee", (ii) Siragusa had received virtually nothing in exchange therefor, and (iii) Siragusa's Marital Payment obligations to Joanne were no longer secured by Joanne's Lien.

76. During the Pre-Reorganization Period, Brown acted as Siragusa's attorney in connection with various matters related to his Divorce Proceedings and conspired with and aided and abetted Siragusa with respect thereto from at least June 1983.

78. Brown (as the attorney for Siragusa and each and all of the other Participants and as a principal and agent of Beckley after the Merger) made many False Joanne Representations to further the Conspiracy and aid and abet the Racketeering Activity while Defendant Brown (and after the Merger, Beckley) was also acting as an attorney for the Trustee in other matters. The False Joanne Representations included without limitation:

A. During the Reorganization Period:

(1) Brown represented that the Medical Practice was in poor financial condition, which misrepresentations Brown continued throughout the Bankruptcy Period.

(2) Brown represented that Siragusa was in poor financial condition, which misrepresentations Brown continued throughout the Bankruptcy Period.

(3) After the time when Siragusa lost his efforts to defend Joanne's Marital Payment Arrearages Motion, Brown represented that Siragusa's Medical Practice Interest had previously been terminated months before by the Reorganization, even though up to the time when Siragusa finally lost Joanne's Marital Payment Arrearages Motion on November 5, 1987, Brown had represented to Joanne that Siragusa's Medical Practice Interest was then still existing.

(4) Brown represented that after Siragusa's purported Termination from the Medical Practice, he was no longer an owner but merely an "employee" thereof.

B. During the Bankruptcy Period: Defendants Brown and Beckley filed their Addendum to Statement of Affairs which falsely and fraudulently represented that:

(1) The Medical Practice and Siragusa were in poor financial condition.

(2) Siragusa's Medical Practice Interest was amended, defaulted and terminated in a proper and legitimate manner by the Siragusa Termination.

(3) The HIN medical practice was dissolved and transferred to CAN in a proper and legitimate manner by the HIN Dissolution.

(4) Siragusa ceased to be an owner and became a mere "employee" of the Medical Practice under proper and legitimate employment contract by the Siragusa Termination.

79. The False Joanne Representations were materially false and (i) known to be false when they were made or (ii) made with reckless disregard as to their truthfulness. To the contrary and in truth and in fact:

A. Siragusa never intended to (i) make the Marital Payments or perform the other obligations required of him under the Decree of Divorce or (ii) honor the Lien and hold and use his Medical Practice Interest as collateral under the Lien.

B. The financial condition of the Medical Practice was initially sound and significantly improved at all Relevant Times sufficiently to provide Siragusa with constantly increasing amounts of Profits, whereby Siragusa could have readily made the required Marital Payments and performed the other obligations required of him under the Decree of Divorce had he not willfully refused to do so.

C. Siragusa's Medical Practice Interest in the Medical Practice had not previously been terminated by the Reorganization months before the time when Siragusa finally lost Joanne's Marital Payment Arrearages Motion on November 5, 1987, but rather his Medical Practice Interest (i) was still existing and subject to Joanne's Lien

and (ii) became property of Siragusa's Bankruptcy Estate upon the filing of Siragusa's Bankruptcy Petition.

D. After Siragusa's purported Termination from the Medical Practice, he was still an owner and not a mere "employee" thereof as Siragusa was paid under side agreements which were admittedly equal to his prior share therein.

E. Siragusa's Bankruptcy Petition and Schedules and Statement of Affairs were fraudulent in that (i) Siragusa still owned his Medical Practice Interest as well as certain cash and other assets which were not reported on his Schedules and surrendered to the Trustee, (ii) Siragusa was not a mere "employee" after his purported Termination as he continued to receive the same Profits therefrom, including without limitation substantial amounts of cash throughout the period shortly before and long after the filing of his Bankruptcy Petition, and (iii) Siragusa's Marital Payment obligations to Joanne continued to be secured by Joanne's Lien, all notwithstanding the purported Reorganization.

F. Defendants Brown and Beckley's Addendum to Statement of Affairs was fraudulent in that:

(1) The financial condition of the Medical Practice and Siragusa were both initially sound and significantly improved at all Relevant Times.

(2) Siragusa's Medical Practice Interest was not amended, defaulted and terminated in a proper and legitimate manner, but rather these purported transactions consisted of a series of sham transactions without adequate consideration, subject to side agreements and

supported by fraudulent documents which had been backdated to coordinate Siragusa's purported Termination and HIN's purported Dissolution with the filing of Siragusa's Bankruptcy Petition to create false impressions with respect to, and conceal the true contrary status of, Siragusa's Medical Practice Interest.

(3) The HIN medical practice was not dissolved and transferred to CAN in a proper and legitimate manner, but rather these purported transactions consisted of a series of sham transactions without adequate consideration, subject to side agreements and supported by fraudulent documents which had been backdated to coordinate Siragusa's purported Termination and HIN's purported Dissolution with the filing of Siragusa's Bankruptcy Petition to create false impressions with respect to, and conceal the true contrary status of, Siragusa's Medical Practice Interest.

(4) Siragusa did not cease to be an owner and instead become a mere "employee" of the Medical Practice under proper and legitimate employment contracts, but rather these purported transactions consisted of a series of sham transactions without adequate consideration, subject to side agreements and supported by fraudulent documents which had been backdated to coordinate Siragusa's purported Termination and HIN's purported Dissolution with the filing of Siragusa's Bankruptcy Petition to create false impressions with respect to, and conceal the true contrary status of, Siragusa's Medical Practice Interest.

80. The False Joanne Representations were material and intended to induce action or inaction on the part of Joanne as described herein.

81. Joanne justifiably and reasonably relied upon the False Joanne Representations until it was subsequently discovered in December 1990 (i) the fraudulent nature of Defendants Brown and Beckley's Addendum to Statement of Affairs and the other False Information which the Defendants and Participants had provided to the Trustee (and Joanne) and (ii) the key role which Defendants Brown and Beckley had in planning and implementing the fraudulent Reorganization and Conspiracy. This False Information was part of the Obstruction of Justice in which Defendants Brown and Beckley and certain of the Participants further destroyed documents and otherwise concealed assets and information from, and provided false responsive testimony to, Joanne and the Trustee throughout the Bankruptcy Case and the Adversary Proceeding (as well as the Divorce Proceedings).

Fraud As To The Bankruptcy Estate

82. During the Relevant Times, Siragusa had the above-described Medical Practice Interest.

83. Upon the filing of Siragusa's Bankruptcy Petition, all of Siragusa's assets, including especially but without limitation his Medical Practice Interest, became the property of Siragusa's Bankruptcy Estate under the Bankruptcy Code.

84. Defendants Brown and Beckley and the Participants engaged in the Conspiracy, including the Racketeering Activity, in part by making numerous false material representations to the Trustee (the "False Trustee Representations").

85. Siragusa made many False Trustee Representations, including but not limited to the following during the Bankruptcy Period: Siragusa filed his Bankruptcy Petition and Schedules and Statement of Affairs which took the fraudulent position that (i) Siragusa no longer owned any of his Medical Practice Interest and had merely become an "employee", (ii) Siragusa had received virtually nothing in exchange therefor, and (iii) Siragusa's Marital Payment obligations to Joanne were no longer secured by Joanne's Lien due to Siragusa's purported Termination.

86. Brown, as the attorney for Siragusa and each and all of the other Participants, as a principal and agent of Beckley after the Merger, and to further the Conspiracy and aid and abet the Racketeering Activity, made many False Trustee Representations while Defendant Brown (and after the Merger, Beckley) was also acting as an attorney for the Trustee in other matters, including but not limited to the following during the Bankruptcy Period: Defendants Brown and Beckley filed their Addendum to Statement of Affairs which falsely and fraudulently represented that (i) the Medical Practice and Siragusa were in poor financial condition, (ii) Siragusa's Medical Practice Interest was amended, defaulted and terminated in a proper and legitimate manner by the Siragusa Termination, (iii) the HIN medical practice was

dissolved and transferred to CAN in a proper and legitimate manner by the HIN Dissolution, and (iv) Siragusa ceased to be an owner and became a mere "employee" of HIN under proper and legitimate employment arrangements following the Siragusa Termination.

87. The False Trustee Representations were materially false and (i) known to be false when they were made or (ii) made with a reckless disregard for their truthfulness. To the contrary and in truth and in fact:

A. Siragusa's Bankruptcy Petition and Schedules and Statement of Affairs were fraudulent in that (i) Siragusa still owned his Medical Practice Interest as well as certain cash and other assets which were not reported on his Schedules and surrendered to the Trustee, (ii) Siragusa was not a mere "employee" after his purported termination as he continued to receive the same Profits therefrom, including without limitation substantial amounts of cash throughout the period shortly before and long after the filing of Siragusa's Bankruptcy Petition herein, and (iii) Siragusa's Marital Payment obligations to Joanne continued to be secured by Joanne's Lien, all notwithstanding the purported Reorganization.

B. Defendants Brown and Beckley's Addendum to Statement of Affairs was fraudulent in that:

(1) The financial condition of the Medical Practice and Siragusa were both initially sound and significantly improved at all Relevant Times.

(2) Siragusa's Medical Practice Interest was not amended, defaulted and terminated in a proper and

legitimate manner, but rather these purported transactions consisted of a series of sham transactions without adequate consideration, subject to side agreements and supported by fraudulent documents which had been backdated to coordinate Siragusa's purported Termination and HIN's purported Dissolution with the filing of Siragusa's Bankruptcy Petition to create false impressions with respect to, and conceal the true contrary status of, Siragusa's Medical Practice Interest.

(3) The HIN medical practice was not dissolved and transferred to CAN in a proper and legitimate manner, but rather these purported transactions consisted of a series of sham transactions without adequate consideration, subject to side agreements and supported by fraudulent documents which had been backdated to coordinate Siragusa's purported Termination and HIN's purported Dissolution with the filing of Siragusa's Bankruptcy Petition to create false impressions with respect to, and conceal the true contrary status of, Siragusa's Medical Practice Interest.

(4) Siragusa did not cease to be an owner and instead become a mere "employee" of the Medical Practice under proper and legitimate employment contracts, but rather these purported transactions consisted of a series of sham transactions without adequate consideration, subject to side agreements and supported by fraudulent documents which had been backdated to coordinate Siragusa's purported Termination and HIN's purported Dissolution with the filing of Siragusa's Bankruptcy Petition to create false impressions with respect to, and conceal the true contrary status of, Siragusa's Medical Practice Interest.

88. The False Trustee Representations were material and intended to induce certain action and inaction on the part of the Trustee as described herein.

89. The Trustee justifiably and reasonably relied upon the False Trustee Representations until it was subsequently discovered in December 1990 (i) the fraudulent nature of Defendants Brown and Beckley's Addendum to Statement of Affairs and the other False Information which the Defendants and Participants had provided to the Trustee (and Joanne) and (ii) the key role which Defendants Brown and Beckley had in planning and implementing the fraudulent Reorganization and Conspiracy. This False Information was part of the Obstruction of Justice in which Defendants Brown and Beckley and certain of the Participants further destroyed documents and otherwise concealed assets and information from, and provided false responsive testimony to, Joanne and the Trustee throughout the Bankruptcy Case and the Adversary Proceeding (as well as the Divorce Proceedings).

Breach Of Fiduciary Duty And Fraud To Siragusa, Ltd

90. Siragusa Ltd was not a wrongdoer, except through the misconduct of its fraudulent principal and agents, Siragusa and Defendants Brown and Beckley, who formed and used Siragusa Ltd as a tool in, and Other Victim of, the Reorganization.

91. Defendants Brown and Beckley and the Participants (besides Siragusa Ltd) each owed fiduciary duties to Siragusa Ltd as its attorney, officer, director, shareholder, and/or partner.

92. Siragusa Ltd is now property of the Bankruptcy Estate, which is entitled to assert the claims of Siragusa Ltd for this misconduct.

93. The above described misconduct of Defendants Brown and Beckley and Siragusa and the other Participants (besides Siragusa Ltd) breached the fiduciary duties owed by them to Siragusa Ltd for its purported Termination from HIN as part of the Siragusa Termination (the "Siragusa Ltd Fiduciary Breaches").

94. The above described misconduct of Defendants Brown and Beckley and Siragusa and the other Participants (besides Siragusa Ltd) also constituted fraud by them against Siragusa Ltd for its purported Termination from HIN.

95. The above described misconduct of Defendants Brown and Beckley further constituted legal malpractice by them to Siragusa Ltd with respect to its purported Termination from HIN.

96. More specifically with respect to the Siragusa Ltd Fiduciary Breaches and the fraud and malpractice to Siragusa Ltd:

A. Around the time Siragusa's Bankruptcy Petition was filed, Defendants Brown (and, if after the Merger, Beckley) prepared a backdated amendment to the HIN Joint Venture Agreement which purportedly authorized the Siragusa Termination from HIN to proceed in a shorter time frame and on materially less favorable terms and conditions than were previously provided by the HIN Joint Venture Agreement (the "HIN Amendment"). The HIN Amendment was backdated by Defendant

Brown (and, if after the Merger, Beckley) and the Participants as part of the Reorganization in which it was agreed that they would ostensibly terminate Siragusa Ltd as an owner of HIN but under side agreements would actually (i) maintain Siragusa's Medical Practice Interest in HIN sub rosa for his future benefit and restore it to him when "legally possible" to do so and (ii) distribute to Siragusa the same equal share of Profits from his Medical Practice Interest under the guise of employment contracts.

B. Pursuant to the HIN Amendment, and as part of the Reorganization, Defendants Brown (and, if after the Merger, Beckley) and the Participants as part of the Reorganization prepared and backdated a notice of default (the "HIN Default Notice") to ostensibly give Siragusa notice that (i) Siragusa Ltd was in default under the HIN Joint Venture Agreement by virtue of Joanne's Lien and (ii) it had a limited number of days in which to cure this incurable default.

C. Pursuant to the fraudulent Reorganization, Siragusa did not respond to the HIN Default Notice, but rather intentionally allowed the interest of Siragusa Ltd in HIN to be ostensibly terminated pursuant to the HIN Amendment.

D. Defendants Brown and Beckley falsely informed the Trustee and Joanne that Siragusa Ltd.'s Medical Practice Interest in HIN had been terminated in this manner when in fact the HIN Termination had not so occurred, or even occurred at all.

Racketeering Activity In Siragusa Medical Practice Interest Scheme

97. The False Joanne and Trustee Representations, the Siragusa Ltd Fiduciary Breaches, and the other misconduct described herein constituted fraud connected with a case under title 11 punishable under the laws of the United States, all within the meaning of 18 U.S.C. 1961(1)(D) as such acts violated 18 U.S.C. 152, which prohibits fraud and concealment with respect to a bankruptcy estate or its trustee. This misconduct, and the resulting diversion of funds and other assets to which the Trustee and Joanne were properly entitled, also constituted violations of (i) N.R.S. 207.360(16) and 205.220 (grand larceny), (ii) N.R.S. 207.360(25) and 205.300 (embezzlement), and (iii) N.R.S. 207.360(26) and 205.380 (obtaining money or property by false pretenses). See attached Exhibit "1" for a list of specific acts constituting these violations.

98. The False Joanne and Trustee Representations, the Siragusa Ltd Fiduciary Breaches, and the other misconduct described herein were made by utilizing the United States mail and therefore constituted mail fraud, all within the meaning of 18 U.S.C. 1961(1)(B) as such acts violated 18 U.S.C. 1341, which prohibits the use of United States mail to further fraudulent schemes. See attached Exhibit "2" for a list of specific acts constituting mail fraud.

99. The False Joanne and Trustee Representations, the Siragusa Ltd Fiduciary Breaches, and the other misconduct described herein were made by utilizing wire communications in interstate or foreign commerce and

therefore constituted wire fraud, all within the meaning of 18 U.S.C. 1961(1)(B) as such acts violated 18 U.S.C. 1343, which prohibits the use of wire communications to further fraudulent schemes. See attached Exhibit "3" for a list of specific acts constituting wire fraud.

100. The False Joanne and Trustee Representations, the Siragusa Ltd Fiduciary Breaches, and the other misconduct described herein were intended to defraud Joanne, the Trustee, the Bankruptcy Estate, the Bankruptcy Court, and the Divorce Court by (i) preparing and providing the Addendum to Statement of Affairs and the other False Information in support of Siragusa's fraudulent Bankruptcy Petition, (ii) further destroying documents and otherwise concealing assets and information from Joanne and the Trustee throughout the Bankruptcy Case and the Adversary Proceeding, (iii) providing false deposition testimony to Joanne and the Trustee throughout the Bankruptcy Case, the Adversary Proceeding and the Divorce Proceedings, and (iv) filing fraudulent proofs of claim in the Bankruptcy Case and making other fraudulent filings therein as well as in the Adversary Proceeding and the Divorce Proceedings, which misconduct is still continuing through and including the filing of this complaint, all within the meaning of 18 U.S.C. 1961(1)(B) as such acts violated 18 U.S.C. 1503 which prohibits the obstruction of justice as more particularly described herein. This misconduct also constituted violations of (i) N.R.S. 207.360(27) and 199.200 (perjury and subornation of perjury) and (ii) N.R.S. 207.360(28) and 199.210 (offering false evidence). See attached Exhibit "4" for a list of specific such acts.

Losses Suffered In Siragusa Medical Practice Interest Scheme

101. As a result of this Scheme, Joanne has suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof and should be trebled as alleged herein. These damages especially include the following items without limitation, subject to credit for the $1,400,000 HIN Settlement payment:

A. The failure to receive the Marital Payments and all other rights and interests to which Joanne was properly entitled under the Decree of Divorce.

B. The impairment of Joanne's ability to execute and foreclose on Siragusa's Medical Practice Interest pursuant to her Lien (the "Foreclosure Sale"), thereby:

(1) Depriving Joanne of her right to conduct and bid at the Foreclosure Sale and thereby become the owner of Siragusa's Medical Practice Interest.

(2) With the resulting loss of the rights and privileges of ownership of Siragusa's Medical Practice Interest, including especially but without limitation (i) the share of the substantial Profits properly attributable to Siragusa's Medical Practice Interest and (ii) the ability to sell that Medical Practice Interest at its fair market value, all for the period of time between the acts which give rise to this claim for relief and the trial of this matter.

C. The expenses to prosecute this action, including especially but without limitation the fees and

costs of investigation and litigation, all as authorized by law.

D. All interest due thereon.

102. As a result of this Scheme, the Bankruptcy Estate has suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof and should be trebled as alleged herein. These damages especially include the following items without limitation, subject to credit for the $1,400,000 HIN Settlement payment:

A. The loss of the rights and interests in Siragusa's Medical Practice Interest which the Bankruptcy Estate was properly entitled to receive under the Bankruptcy Code, thereby depriving the Bankruptcy Estate of the rights and privileges of ownership of Siragusa's Medical Practice Interest, including especially but without limitation (i) the share of the substantial Profits properly attributable to Siragusa's Medical Practice Interest and (ii) the ability to sell that Medical Practice Interest at its fair market value, all for the period of time between the acts which give rise to this claim for relief and the trial of this matter.

B. The expenses to prosecute this action, including especially but without limitation the fees and costs of investigation and litigation, all as authorized by law.

C. All interest due thereon.

103. As a result of this Scheme, Valley Bank of Nevada has received $2,500 from the Bankruptcy Estate in

compromise of its two above described creditor's claims totalling approximately $45,000, thereby resulting in a loss of the balance of these claims and making it a Non-participant Victim. However, all of the remaining claims of the Other Bankruptcy Creditors have been paid in full outside of the Bankruptcy Estate pursuant to the side agreements in the Reorganization by Siragusa, Bowers, Heeren and/or their respective entities using, at least in part, funds comprising and attributable to Siragusa's Medical Practice Interest which were subject to the rights of Joanne and the Trustee under, respectively, the Decree of Divorce and the Bankruptcy Code.

The Scheme To Fraudulently Acquire And Maintain Heeren's HIN Medical Practice Interest

104. Around the time Siragusa's Bankruptcy Petition was filed and as part of the fraudulent Reorganization, Defendant Brown (and, to the extent after the Merger, Beckley) and Participants Bowers and CAN (along with (i) the various other Participants besides Heeren and (ii) the currently unknown Doe Defendants) knowingly, intentionally, willfully and unlawfully devised and implemented a plan to defraud Heeren (which includes Heeren Ltd) out of his Medical Practice Interest in HIN, which misconduct is sometimes referred to as the Fraud Upon Heeren.

105. This Scheme involved the use of the Reorganization (including primarily the Siragusa Termination, the HIN Dissolution, the Bankruptcy Petition, and the False Information), the Fraud Upon Heeren, and the Obstruction of Justice to (i) first acquire and then maintain

Heeren's HIN Medical Practice Interest and the control of the Enterprise resulting therefrom and (ii) conduct the Medical Practice Enterprise, subject to side agreements to (a) maintain Heeren's HIN Medical Practice Interest sub rosa for his future benefit and restore it to him when "legally possible" to do so and (b) distribute to Heeren the same equal share of Profits from his Medical Practice Interest under the guise of employment contracts. The transaction by which Heeren was induced to exchange his own HIN Medical Practice Interest for a new replacement corporate ownership interest in the CAN Medical Practice is sometimes referred to as the "Heeren Stock Sale". At all Relevant Times through and after the Heeren Stock Sale, Participant Bowers was in control of Participant CAN and the Heeren Stock Sale was used retain such control.

106. The Fraud Upon Heeren especially involved the HIN Dissolution which was in part intended to protect the Medical Practice from legal action by Joanne and the Trustee by:

A. Ostensibly destroying HIN's medical practice and the interest of Siragusa and Heeren therein by transferring it to CAN in order to make the Siragusa Termination look "legitimate" by purporting to adversely affect Heeren as well as Siragusa.

B. Further destroying the rights of Joanne and the Bankruptcy Estate in Siragusa's Medical Practice Interest by removing the medical practice from HIN, in which Siragusa had his Medical Practice Interest, to CAN, in which Siragusa had no record interest.

107. In addition, the HIN Dissolution was also intended by Defendants Brown and Beckley and the Participants (besides Heeren) to carry out the Fraud Upon Heeren to defraud him out of his own HIN Medical Practice Interest through the Heeren Stock Sale as described herein.

108. Defendants Brown and Beckley and the Participants (besides Heeren) each owed fiduciary duties to Heeren and Heeren Ltd as its attorney or partner.

109. Defendants Brown and Beckley and the Participants (besides Heeren) engaged in the Conspiracy, including the Racketeering Activity, in part by making numerous false material representations to Heeren (the "False Heeren Representations").

110. Bowers and CAN (as the partner of Heeren in the Medical Practice Enterprise) and Brown (as the attorney for Heeren and each and all of the other Participants and as a principal and agent of Beckley after the Merger) made many False Heeren Representations to further the Conspiracy and aid and abet the Racketeering Activity, while Defendant Brown (and after the Merger, Beckley) was also acting as attorney for Heeren in other matters. The False Heeren Representations included without limitation:

A. During the Reorganization Period:

(1) That Joanne's Marital Payment claims against Siragusa could not be compromised or otherwise settled as Joanne was intent on attaching assets of, and otherwise harming, the Medical Practice. The Trustee in

the Siragusa Bankruptcy would similarly attach assets of, or otherwise harm, the Medical Practice.

(2) That the Siragusa Termination, the HIN Dissolution, the Siragusa Bankruptcy Petition, the False Information, and the other steps in the Reorganization as described more fully herein were all necessary and appropriate to protect the Medical Practice from harm by Joanne and the Trustee.

(3) No adverse economic or other consequences would result to Heeren's own ownership interests in the Medical Practice by following those steps in the Reorganization due to the side agreements to (i) maintain Heeren's HIN Medical Practice Interest sub rosa for his future benefit and restore it to him when "legally possible" to do so and (ii) distribute to Heeren the same equal share of Profits from his Medical Practice Interest under the guise of employment contracts. This restoration of Heeren's own HIN Medical Practice Interest was to be in the form of a new replacement corporate ownership interest in the CAN Medical Practice under the Heeren Stock Sale.

B. During the Bankruptcy Period:

(1) Around mid-1988, Heeren discovered information which indicated that he was not actually sharing equally in the Profits of the Medical Practice. After Heeren discussed this concern with Participants Bowers and CAN, Participants Bowers and CAN continued the False Heeren Representations by giving Heeren certain "compensation" bonuses and raises which Bowers and CAN falsely represented would provide the previously agreed upon equal sharing.

(2) Around the end of 1988, Heeren discovered additional information which indicated that the Medical Practice Profits were still not being shared equally and engaged separate counsel besides Defendants Brown and Beckley regarding these matters. From that time until July 1989, Defendants Brown and Beckley and Participants Bowers and CAN continued the False Heeren Representations by: (i) falsely representing to Heeren that the Medical Practice Profits were being shared equally, (ii) failing to inform Heeren or his counsel that Heeren was no longer considered by Defendants Brown and Beckley and Participants Bowers and CAN to be an owner of the HIN Medical Practice, and (iii) falsely negotiating with Heeren and his counsel about when and how Heeren's HIN Medical Practice Interest would be restored by a new replacement corporate ownership interest in the CAN Medical Practice under the Heeren Stock Sale, all even though Defendants Brown and Beckley and Participants Bowers and CAN had no intention of honoring the side agreements to (a) maintain Heeren's HIN Medical Practice Interest sub rosa for his future benefit and restore it to him when "legally possible" to do so and (b) distribute to Heeren the same equal share of Profits from his Medical Practice Interest under the guise of employment contracts. In July 1989 and only after the original Adversary Proceeding had been filed, Defendants Brown and Beckley and Participants Bowers and CAN finally informed Heeren and his counsel that Defendants Brown and Beckley and Participants Bowers and CAN did not in fact consider Heeren to be an owner of any interest in the HIN or CAN Medical Practice.

111. The False Heeren Representations were materially false and (i) known to be false when they were made or (ii) made with a reckless disregard for their truthfulness. To the contrary and in truth and in fact:

A. The terms on which Joanne was then willing to compromise or otherwise settle her Marital Payment claims against Siragusa were acceptable to Heeren but were withheld from him by Defendant Brown (and after the Merger, Beckley) and Participants Bowers and CAN. In any event, neither Joanne nor the Trustee could have attached assets of, or otherwise harmed, the Medical Practice as Defendant Brown (and after the Merger, Beckley) and Participants Bowers and CAN misrepresented to Heeren to be the case.

B. None of the Siragusa Termination, the HIN Dissolution, the Siragusa Bankruptcy Petition, the False Information, and the other steps in the Reorganization were necessary or appropriate to protect the Medical Practice from harm by Joanne or the Trustee. To the contrary, these steps in the Reorganization were part of the series of sham transactions without adequate consideration, subject to side agreements and supported by fraudulent documents which had been backdated to coordinate Siragusa's purported Termination and HIN's purported Dissolution with the filing of Siragusa's Bankruptcy Petition to create false impressions with respect to, and conceal the true contrary status of, Siragusa's and Heeren's Medical Practice Interests. Accordingly, the efforts to take these steps to discourage Joanne and the Trustee from pursuing their respective rights in Siragusa's Medical Practice Interest were improper and illegitimate. Further, these steps were taken to defraud

Heeren out of his own HIN Medical Practice Interest through the Heeren Stock Sale.

C. Adverse economic and other consequences did result to Heeren's own HIN Medical Practice Interest following those steps in the Reorganization notwithstanding the side agreements to (i) maintain Heeren's HIN Medical Practice Interest sub rosa for his future benefit and restore it to him when "legally possible" to do so and (ii) distribute to Heeren the same equal share of Profits from his Medical Practice Interest under the guise of employment contracts. Heeren never received either his share of Profits or new replacement corporate ownership interest.

D. The information Heeren discovered around mid-1988 which indicated that he was not actually sharing equally in the Profits of the Medical Practice was correct and these equal sharing discrepancies were so large that the "compensation" bonuses and raises which Participants Bowers and CAN falsely represented would provide the previously agreed upon equal sharing were grossly inadequate to do so.

E. These equal sharing discrepancies in the Profits of the Medical Practice in fact continued through the end of 1988.

F. When Heeren engaged separate counsel regarding these matters, Defendants Brown and Beckley and Participants Bowers and CAN failed to inform Heeren or his counsel until July 1989 that Heeren was not sharing equally in the Profits of the Medical Practice and was no longer considered by Defendants Brown and Beckley and Participants Bowers and CAN to be an

owner of the HIN Medical Practice. Instead, they falsely (i) assured Heeren he was sharing equally in the Profits and (ii) negotiated with Heeren and his counsel until July 1989 about when and how Heeren's HIN Medical Practice Interest would be restored by a new replacement ownership interest in the CAN Medical Practice under the Heeren Stock Sale, even though Defendants Brown and Beckley and Participants Bowers and CAN had no intention of honoring the side agreements.

112. The False Heeren Representations were material and intended to induce certain action and inaction on the part of Heeren as described herein.

113. Heeren justifiably and reasonably relied upon the False Heeren Representations until July 1989 when Defendants Brown and Beckley and Participants Bowers and CAN finally informed him they had no intention of honoring the side agreements.

114. The above described misconduct of Defendants Brown and Beckley and Siragusa and the other Participants (besides Heeren) (i) breached the fiduciary duties owed by them to Heeren (the "Heeren Fiduciary Breaches"), (ii) constituted fraud by them against Heeren, and (iii) constituted legal malpractice by Defendants Brown and Beckley, all with respect to HIN's purported Dissolution and the Heeren Stock Sale.

Racketeering Activity In The Heeren Medical Practice Interest Scheme

115. The False Heeren Representations, the Heeren Fiduciary Breaches, and the other misconduct described herein constituted fraud connected with a case under title 11 punishable under the laws of the United States, all within the meaning of 18 U.S.C. 1961(1)(D) as such acts violated 18 U.S.C. 152, which prohibits fraud and concealment with respect to a bankruptcy estate or its trustee as more particularly described herein. This misconduct also constituted violations of (i) N.R.S. 207.360(16) and 205.220 (grand larceny), (ii) N.R.S. 207.360(25) and 205.300 (embezzlement), and (iii) N.R.S. 207.360(26) and 205.380 (obtaining money or property by false pretenses). See attached Exhibit "1" for a list of specific such acts.

116. The False Heeren Representations, the Heeren Fiduciary Breaches, and the other misconduct described herein were made by utilizing the United States mail and therefore constituted mail fraud, all within the meaning of 18 U.S.C. 1961(1)(B) as such acts violated 18 U.S.C. 1341, which prohibits the use of United States mail to further fraudulent schemes as more particularly described herein. See attached Exhibit "2" for a list of specific such acts.

117. The False Heeren Representations, the Heeren Fiduciary Breaches, and the other misconduct described herein were made by utilizing wire communications in interstate or foreign commerce and therefore constituted wire fraud, all within the meaning of 18 U.S.C. 1961(1)(B) as such acts violated 18 U.S.C. 1343, which prohibits the use of wire communications to further fraudulent

schemes. See attached Exhibit "3" for a list of specific acts constituting wire fraud.

118. The False Heeren Representations, the Heeren Fiduciary Breaches, and the other misconduct described herein were intended to defraud Joanne, the Trustee, the Bankruptcy Estate and the Bankruptcy Court by (i) preparing and providing the Addendum to Statement of Affairs and the other False Information in support of Siragusa's fraudulent Bankruptcy Petition, (ii) further destroying documents and otherwise concealing assets and information from Joanne and the Trustee throughout the Bankruptcy Case and the Adversary Proceeding, (iii) providing fraudulent deposition testimony to Joanne and the Trustee throughout the Bankruptcy Case and the Adversary Proceeding, and (iv) filing fraudulent proofs of claim in the Bankruptcy Case and making other fraudulent filings therein as well as in the Adversary Proceeding, which misconduct is still continuing through and including the filing of this complaint, all within the meaning of 18 U.S.C. 1961(1)(B) as such acts violated 18 U.S.C. 1503 which prohibits the obstruction of justice as more particularly described herein. This misconduct also constituted violations of (i) N.R.S. 207.360(27) and 199.200 (perjury and subornation of perjury) and (ii) N.R.S. 207.360(28) and 199.210 (offering false evidence). See attached Exhibit "4" for a list of specific such acts.

119. The False Heeren Representations, the Heeren Fiduciary Breaches, and the other misconduct described herein constituted fraud in the sale of securities punishable under the laws of the United States, all within the meaning of 18 U.S.C. 1961(1)(D) as such acts utilized the means and instrumentalities of interstate commerce and

the mails and violated (i) Sections 12(2), 15 and 17 of the Securities Act of 1933, as amended, (ii) Sections 10(b) and 20 of the Securities Exchange Act of 1934, as amended, and (iii) Securities and Exchange Commission Rule 10-b5, 17 CFR 240.10b-5 (1991), which prohibit fraud in connection with the offer or sale of securities as more particularly described herein. This misconduct also constituted violations of N.R.S. 207.360(30) and 90.570 (securities fraud). See attached Exhibit "5" for a list of specific such acts.

Losses Suffered In Heeren Medical Practice Interest Scheme

120. As a result of this Scheme, Heeren has suffered similar types of losses, fees and costs with respect to his own HIN Medical Practice Interest as those losses which Joanne and the Trustee have suffered with respect to Siragusa's Medical Practice Interest.

121. As a result of this Scheme, the Bankruptcy Estate's property rights in Siragusa's Medical Practice Interest and Joanne's rights therein have been further impaired by the transfer of HIN's medical practice to CAN under the purported HIN Dissolution.

The CAN Stock Sales Scheme

122. In conjunction with the fraudulent Reorganization, Defendants Brown and Beckley, and Participants Bowers and CAN (along with the various other Participants besides Heeren and the currently unknown Doe Defendants) knowingly, intentionally, willfully and unlawfully devised, conspired, conducted, implemented

and/or participated in a plan to defraud the CAN Junior Owners through the CAN Stock Sales.

123. This Scheme primarily involved the use of the Fraud Upon The CAN Junior Owners, the False Information, and the Obstruction of Justice to (i) maintain Bower's remaining Medical Practice Interest and the control of the Enterprise resulting therefrom and (ii) conduct the Enterprise for his further benefit. At all Relevant Times through and after the CAN Stock Sales, Participant Bowers was in control of Participant CAN and the CAN Stock Sales were used retain such control and the CAN Junior Owners as CAN employees.

124. During the Relevant Times through and including the times of the various CAN Stock Sales, the CAN Junior Owners were employee physicians of the Medical Practice who wanted to acquire ownership interests therein in connection with their continued employment.

125. Defendants Brown and Beckley and Participants Bowers and CAN each owed fiduciary duties to the CAN Junior Owners as their respective attorney, employer, or manager, as appropriate.

126. Prior to the CAN Stock Sales, Joanne and the Trustee had commenced the Adversary Proceeding to recover, among other things, (i) Joanne's rights in Siragusa's Medical Practice Interest and (ii) the Bankruptcy Estate's property rights therein notwithstanding the various fraudulent conveyances of Siragusa's Medical Practice Interest under the Reorganization (collectively the "Potential HIN/CAN Medical Practice Claims Recovery").

127. At all Relevant Times through the CAN Stock Sales to each of the CAN Junior Owners, including without limitation the original sales in April 1990, the status of the Potential HIN/CAN Medical Practice Claims Recovery was a material fact which was reasonably and actually of concern to each of the CAN Junior Owners with respect to their continued employment and related ownership interest desires.

128. Even though the CAN Junior Owners expressly inquired about the Potential HIN/CAN Medical Practice Claims Recovery prior to the original CAN Stock Sales in April 1990, Participants Bowers and CAN and Defendants Brown and Beckley used the Reorganization and the rest of the Conspiracy to conceal the Potential HIN/CAN Medical Practice Claims Recovery from the CAN Junior Owners and induce them (i) first to continue their employment and (ii) then to enter into the CAN Stock Sales notwithstanding the claims by Joanne and the Trustee which resulted in the Adversary Proceeding.

129. In addition to the other misconduct alleged with respect to the Reorganization and the rest of the Conspiracy, Participants Bowers and CAN and Defendants Brown and Beckley made the following material false representations and omissions as part of their Scheme to defraud the CAN Junior Owners (which together with the other Reorganization and Conspiracy misconduct are collectively referred to as the "CAN Junior Owner Mispresentations/Omissions"):

A. Participants Bowers and CAN and Defendants Brown and Beckley failed to advise the CAN Junior Owners of the full range of such possibilities comprising

the Potential HIN/CAN Medical Practice Claims Recovery, including without limitation (i) that Joanne and the Trustee were seeking to avoid and unwind Siragusa's Termination and the HIN Dissolution and (ii) the implications which such recovery could have on the proposed CAN Stock Sales.

B. Participants Bowers and CAN and Defendants Brown and Beckley affirmatively misrepresented to the CAN Junior Owners that the maximum Potential HIN/CAN Medical Practice Claims Recovery liability faced by CAN was $250,000.

130. In addition to making the above described CAN Junior Owner Mispresentations/Omissions to directly the CAN Junior Owners, Defendants Brown and Beckley knowingly, intentionally, willfully and unlawfully aided and abetted Participants Bowers and CAN in carrying out the fraudulent CAN Stock Sales by structuring the subject transactions, advising Participants Bowers and CAN with respect thereto, and preparing the documents therefor.

131. The CAN Junior Owner Mispresentations/Omissions were materially false and (i) known to be false when they were made or (ii) made with a reckless disregard for their truthfulness.

132. To the contrary, and in truth and in fact, at the time of the original CAN Stock Sales, the Potential HIN/CAN Medical Practice Claims Recovery was far in excess of $250,000 and included avoidance and unwinding of Siragusa's Termination and the HIN Dissolution with the resulting adverse implications for the proposed CAN Junior Owners as described herein.

133. But for the CAN Junior Owner Mispresentations/Omissions, including without limitation the other misconduct alleged with respect to the Reorganization and the rest of the Conspiracy, the CAN Junior Owners would have known the true status of the Potential HIN/CAN Medical Practice Claims Recovery.

134. The CAN Junior Owner Mispresentations/Omissions were material and intended to induce certain action and inaction on the part of the CAN Junior Owners as described herein.

135. Defendants Brown and Beckley and Participants Bowers and CAN used the means and instrumentalities of interstate commerce and the mails to further and accomplish the CAN Stock Sales, including without limitation by (i) the mailings described in Exhibit "2" with respect to the Reorganization and the rest of the Conspiracy, (ii) the interstate telephone calls with respect thereto described in Exhibit "3", (iii) the additional mailings and telephone calls described in attached Exhibit "5", and (iv) the clearance of the purchase checks from the CAN Junior Owners through the national banking system.

136. The CAN Junior Owners justifiably and reasonably relied on the CAN Junior Owner Mispresentations/Omissions until July 1992 when Participants Bowers and CAN presented them with the HIN Settlement under which CAN was required to pay substantially all of the $1,400,000 HIN Settlement payment.

137. After the HIN Settlement payment in 1992, CAN Junior Owners Uhl and Steljes requested redemption of their CAN Stock pursuant to their various written

agreements but Participants CAN and Bowers have refused, and still continue to refuse to do so, instead claiming that these CAN shares have no value.

138. The above described misconduct of Defendants Brown and Beckley and Participants Bowers and CAN (i) breached the fiduciary duties owed by them to the CAN Junior Owners (the "CAN Junior Fiduciary Breaches"), (ii) constituted fraud by Defendants Brown and Beckley and Participants Bowers and CAN against the CAN Junior Owners, and (iii) constituted legal malpractice by Defendants Brown and Beckley, all with respect to the CAN Stock Sales.

Racketeering Activity In The CAN Stock Sale Scheme

139. The False Joanne, Trustee and Heeren Representations, the Siragusa Ltd and Heeren Fiduciary Breaches, and the other misconduct described herein (which were intended to defraud Joanne, the Trustee, the Bankruptcy Estate, the Bankruptcy Court and the Divorce Court and constituted fraud connected with a case under title 11 punishable under the laws of the United States, all within the meaning of, and in violation of, 18 U.S.C. 1961(1)(D) and 18 U.S.C. 152 as described herein) were also used by Defendants Brown and Beckley and Participants Bowers and CAN to accomplish the Fraud Upon The CAN Junior Owners by inducing them to continue their employment with CAN and enter into the CAN Stock Sales as more particularly described herein. This misconduct also constituted violations of (i) N.R.S. 207.360(16) and 205.220 (grand larceny), (ii) N.R.S. 207.360(25) and 205.300 (embezzlement), and (iii) N.R.S.

207.360(26) and 205.380 (obtaining money or property by false pretenses). See attached Exhibit "1" for a list of specific such acts.

140. The CAN Junior Owner Mispresentations/ Omissions, the CAN Junior Owner Fiduciary Breaches, and the other misconduct described herein were made by utilizing the United States mail and therefore constituted mail fraud, all within the meaning of 18 U.S.C. 1961(1)(B) as such acts violated 18 U.S.C. 1341, which prohibits the use of United States mail to further fraudulent schemes as more particularly described herein. This misconduct also constituted violations of (i) N.R.S. 207.360(16) and 205.220 (grand larceny); (ii) N.R.S. 207.360(25) and 205.300 (embezzlement), and (iii) N.R.S. 207.360(26) and 205.380 (obtaining money or property by false pretenses). See attached Exhibit "2" for a list of specific such acts.

141. The CAN Junior Owner Mispresentations/ Omissions, the CAN Junior Owner Fiduciary Breaches, and the other misconduct described herein were made by utilizing wire communications in interstate or foreign commerce and therefore constituted wire fraud, all within the meaning of 18 U.S.C. 1961(1)(B) as such acts violated 18 U.S.C. 1343, which prohibits the use of wire communications to further fraudulent schemes. See attached Exhibit "3" for a list of specific acts constituting wire fraud.

142. The False Joanne, Trustee and Heeren Representations, the Siragusa Ltd and Heeren Fiduciary Breaches, and the other misconduct described herein (which were intended to defraud Joanne, the Trustee, the Bankruptcy Estate, the Bankruptcy Court and the Divorce

Court and constituted an obstruction of justice within the meaning of, and in violation of, 18 U.S.C. 1961(1)(B) and 18 U.S.C. 1503 as described herein) were also used by Defendants Brown and Beckley and Participants Bowers and CAN to accomplish the Fraud Upon The CAN Junior Owners by inducing them to continue their employment with CAN and enter into the CAN Stock Sales as more particularly described herein. This misconduct also constituted violations of (i) N.R.S. 207.360(27) and 199.200 (perjury and subornation of perjury) and (ii) N.R.S. 207.360(28) and 199.210 (offering false evidence). See attached Exhibit "4" for a list of specific such acts.

143. The CAN Junior Owner Mispresentations/ Omissions, the CAN Junior Owner Fiduciary Breaches, and the other misconduct described herein constituted fraud in the sale of securities punishable under the laws of the United States, all within the meaning of 18 U.S.C. 1961(1)(D) as such acts utilized the means and instrumentalities of interstate commerce and the mails and violated (i) Sections 12(2), 15 and 17 of the Securities Act of 1933, as amended, (ii) Sections 10(b) and 20 of the Securities Exchange Act of 1934, as amended, and (iii) Securities and Exchange Commission Rule 10-b5, 17 CFR 240.10b-5 (1991), which, prohibit fraud in connection with the offer or sale of securities as more particularly described herein. This misconduct also constituted violations of N.R.S. 207.360(30) and 90.570 (securities fraud). See attached Exhibit "5" for a list of specific such acts.

Losses Suffered In CAN Stock Sale Scheme

144. As a result of this Scheme, the CAN Junior Owners have suffered losses of their CAN Stock Sale purchase payments. The amounts of funds paid by the CAN Junior Owners in the fraudulent sale of the CAN Stock and the CAN Junior Owners who have been refused redemption are:

CAN Junior Owners Names	CAN Stock Sale Amount ($)*
Gregory S. Uhl, M.D. **	193,750
Gary D. More, M.D.	193,750
Harry M. Thomas, M.D.	193,750
Matthew J. McMahon, D.O.	193,750
Alan Steljes, M.D. **	35,000
TOTAL	810,000

[*Initial purchase price exclusive of additional capital contributions; **CAN refused redemption request due to purported total lack of value of CAN Stock.]

145. As a result of this Scheme, the Bankruptcy Estate's property rights in Siragusa's Medical Practice Interest and Joanne's rights therein have been further impaired by the dilution thereof caused by the CAN Stock Sales.

The Scheme To Obstruct Justice

146. In conjunction with the fraudulent Reorganization, Defendant Brown and (after the Merger, Beckley), and Participants Bowers and CAN (along with the various other Participants and the currently unknown Doe Defendants) knowingly, intentionally, willfully and

unlawfully devised, conspired, conducted, implemented and/or participated in a plan to defraud Joanne, the Trustee, the Bankruptcy Estate, the Bankruptcy Court and the Divorce Court in order to carry out the other Schemes described herein.

147. This Scheme involved the use of fraudulent filings in the Divorce Court, the fraudulent Bankruptcy Petition, Defendants Brown and Beckley's Addendum to Statement of Affairs and the other False Information in the Bankruptcy Court, and was expanded to include numerous acts of perjury, fabrication of false documents, and destruction of documents when the Bankruptcy Petition and the False Information were challenged by Joanne and the Trustee, all to (i) acquire and maintain Siragusa's and Heeren's HIN Medical Practice Interest and the control of the Enterprise resulting therefrom and (ii) conduct the Enterprise to the detriment of Joanne, the Bankruptcy Estate and the other Victims.

148. More specifically, the corrupt and fraudulent methods by which Defendant Brown and (after the Merger, Beckley), and Participants Bowers and CAN (along with the various other Participants and the currently unknown Doe Defendants) knowingly, intentionally, willfully and unlawfully attempted to, and did, influence, obstruct and impede the administration of justice in the Bankruptcy Case, the Adversary Proceeding, the Bankruptcy Estate, and the Divorce Proceedings from the beginning of the Reorganization Period through this point in time include:

A. Preparing and filing with the Bankruptcy Court (i) the fraudulent Bankruptcy Petition, (ii) Defendants Brown and Beckley's Addendum to Statement of Affairs which expressly undertook to "explain the history and nature of the Heart Institute of Nevada, and Dr. Siragusa's participation therein", and (iii) the other False Information in support of Siragusa's Bankruptcy Petition. This False Information primarily described the so-called Reorganization which consisted of a series of sham transactions without adequate consideration, subject to side agreements and supported by fraudulent documents which had been backdated to coordinate Siragusa's purported Termination and HIN's purported Dissolution with the filing of Siragusa's Bankruptcy Petition to create false impressions with respect to, and conceal the true contrary status of, Siragusa's and Heeren's Medical Practice Interests. Accordingly, the efforts to take these steps to discourage Joanne and the Trustee from pursuing their respective rights in Siragusa's Medical Practice Interest were improper and illegitimate. These steps were also taken to defraud Heeren out of his own HIN Medical Practice Interest through the Heeren Stock Sale. These steps were further taken to defraud the CAN Junior Owners through the CAN Stock Sales.

B. Destroying and otherwise concealing documents (the "missing documents") which related to critical events in the purported Reorganization from Joanne and the Trustee despite repeated subpoenas and other discovery requests in the Bankruptcy Case and the Adversary Proceeding and multiple Bankruptcy Court orders compelling such production. After being repeatedly sanctioned by the Bankruptcy Court for the ongoing failure to

comply with its orders compelling production, and being threatened with the striking of defenses, Defendants Brown and Beckley miraculously did locate some, but by no means all of the purportedly "missing documents". The remaining "missing documents" have either been destroyed or otherwise concealed by Defendant Brown and (after the Merger, Beckley), and Participants Bowers and CAN (along with the various other Participants and the currently unknown Doe Defendants).

C. Providing fraudulent deposition testimony, and encouraging others to do so, about the Reorganization and other matters to Joanne and the Trustee despite the applicable oaths and even Bankruptcy Court orders compelling testimony about these matters. This fraudulent deposition testimony has been (i) internally inconsistent for Brown and other deponents, (ii) inconsistent between Brown and other deponents, (iii) inconsistent when compared to legitimate documents, and (iv) based on fraudulent documents, such as those backdated in the Reorganization.

D. Filing fraudulent proofs of claim in the Bankruptcy Case and making other fraudulent filings therein as well as in the Adversary Proceeding and the Divorce Proceedings to carry out the fraudulent Reorganization.

Racketeering Activity In The Obstruction Scheme

149. The Obstruction of Justice described herein constituted fraud connected with a case under title 11 punishable under the laws of the United States, all within the meaning of 18 U.S.C. 1961(1)(D) as such acts violated

18 U.S.C. 152, which prohibits fraud and concealment with respect to a bankruptcy estate or its trustee as more particularly described herein. This misconduct also constituted violations of (i) N.R.S. 207.360(16) and 205.220 (grand larceny), (ii) N.R.S. 207.360(25) and 205.300 (embezzlement), and (iii) N.R.S. 207.360(26) and 205.380 (obtaining money or property by false pretenses). See attached Exhibit "1" for a list of specific such acts.

150. The Obstruction of Justice described herein was carried out by utilizing the United States mail and therefore constituted mail fraud, all within the meaning of 18 U.S.C. 1961(1)(B) as such acts violated 18 U.S.C. 1341, which prohibits the use of United States mail to further fraudulent schemes as more particularly described herein. See Exhibit "1" for a list of specific such acts.

151. The Obstruction of Justice described herein were made by utilizing wire communications in interstate or foreign commerce and therefore constituted wire fraud, all within the meaning of 18 U.S.C. 1961(1)(B) as such acts violated 18 U.S.C. 1343, which prohibits the use of wire communications to further fraudulent schemes. See attached Exhibit "3" for a list of specific acts constituting wire fraud.

152. The Obstruction of Justice and the other misconduct described herein were intended to defraud Joanne, the Trustee, the Bankruptcy Estate, the Bankruptcy Court, and the Divorce Court by (i) preparing and providing the Addendum to Statement of Affairs and the

other False Information in support of Siragusa's fraudulent Bankruptcy Petition, (ii) further destroying documents and otherwise concealing assets and information from Joanne and the Trustee throughout the Bankruptcy Case and the Adversary Proceeding, (iii) providing false deposition testimony to Joanne and the Trustee through out the Bankruptcy Case, the Adversary Proceeding and the Divorce Proceedings, and (iv) filing fraudulent proofs of claim in the Bankruptcy Case and making other fraudulent filings therein as well as in the Adversary Proceeding and the Divorce Proceedings, which misconduct is still continuing through and including the filing of this complaint, all within the meaning of 18 U.S.C. 1961(1)(B) as such acts violated 18 U.S.C. 1503 which prohibits the obstruction of justice as more particularly described herein. This misconduct also constituted violations of (i) N.R.S. 207.360(27) and 199.200 (perjury and subornation of perjury) and (ii) N.R.S. 207.360(28) and 199.210 (offering false evidence). See attached Exhibit "4" for a list of specific such acts.

153. The Obstruction of Justice was were also used by Defendants Brown and Beckley and Participants Bowers and CAN to accomplish the Fraud Upon Heeren and the Fraud Upon The CAN Junior Owners as more particularly described herein, which misconduct constituted fraud in the sale of securities punishable under the laws of the United States, all within the meaning of 18 U.S.C. 1961(1)(D) as such acts utilized the means and instrumentalities of interstate commerce and the mails and violated (i) Sections 12(2), 15 and 17 of the Securities Act of 1933, as amended, (ii) Sections 10(b) and 20 of the Securities Exchange Act of 1934, as amended, and (iii)

Securities and Exchange Commission Rule 10-b5, 17 CFR 240.10b-5 (1991), which prohibit fraud in connection with the offer or sale of securities as more particularly described herein. This misconduct also constituted violations of N.R.S. 207.360(30) and 90.570 (securities fraud). See attached Exhibit "5" for a list of specific such acts.

Losses Suffered In Obstruction Scheme

154. As a result of this Scheme, the acquisition and maintenance of an interest in and control of the Medical Practice Enterprise, and the fraudulent conduct thereof, have been accomplished, furthered and prolonged, thereby further impairing (i) the Bankruptcy Estate's property rights in Siragusa's Medical Practice Interest and (ii) Joanne's rights therein.

155. As a result of this Scheme, the Fraud Upon Heeren, the Fraud Upon the CAN Junior Owners, and the Fraud Upon the Other Bankruptcy Creditors have been accomplished, furthered and prolonged, thereby impairing their respective rights and interests.

FIRST CLAIM FOR RELIEF

(Violation of 18 U.S.C. 1962(b), including aiding and abetting liability under 18 U.S.C. 2)

156. Plaintiffs reallege each of the foregoing paragraphs.

157. Joanne, the Trustee, and Defendants Brown and Beckley (and certain unknown Does), and each of the Participants are "persons" within the meaning of 18 U.S.C. 1961(3) and 1964(c).

158. The Medical Practice, consisting of its various component entities including primarily but without limitation HIN, CAN, HICL and HIP at the primary 1090 E. Desert Inn Road, Clark County, Nevada location and at all of the other locations utilized for the conduct of the Medical Practice within and outside of the State of Nevada is (i) the Enterprise which is the subject of this complaint and (ii) an "association in fact enterprise" within the meaning of 18 U.S.C. 1961(4) and 1962(b), which Enterprise was engaged in and the activities of which affected interstate commerce during the Relevant Times.

159. The Participants, including especially Bowers and Siragusa, each knowingly, intentionally, willfully and unlawfully acquired and/or maintained an interest in or control of the Medical Practice Enterprise through the pattern of Racketeering Activity set forth above, all in violation of 18 U.S.C. 1962(b).

160. The various Participants so acted as principals. Defendants Brown and Beckley (and certain unknown Does) have, within the meaning of 18 U.S.C. 2, knowingly, intentionally, willfully and unlawfully rendered substantial assistance to the various Participants by aiding, abetting, counselling, or inducing them to violate 18 U.S.C. 1962(b) ("aiding and abetting").

161. The pattern of Racketeering Activity through which the Participants, aided and abetted by Defendants Brown and Beckley (and certain unknown Does), acquired and/or maintained an interest in or control of the Medical Practice Enterprise included the following:

A. Multiple instances of bankruptcy fraud in violation of 18 U.S.C. 152.

B. Multiple instances of mail fraud in violation of 18 U.S.C. 1341.

C. Multiple instances of wire fraud in violation of 18 U.S.C. 1343.

D. Multiple instances of obstruction of justice in violation of 18 U.S.C. 1503.

E. Multiple instances of fraud in the sale of securities punishable under the laws of the United States in violation of Sections 12(2), 15 and 17 of the Securities Act of 1933, as amended, (ii) Sections 10(b) and 20 of the Securities Exchange Act of 1934, as amended, and (iii) Securities and Exchange Commission Rule 10-b5, 17 CFR 240.10b-5 (1991).

162. As a direct and proximate result of the 18 U.S.C. 1962(b) violation, Joanne and the Bankruptcy Estate have suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof and should be trebled pursuant to 18 U.S.C. 1964(c). These damages especially include the following items without limitation, subject to credit for the $1,400,000 HIN Settlement payment

A. With respect to Joanne:

(1) The failure to receive the Marital Payments and all other rights and interests to which Joanne was properly entitled under the Decree of Divorce.

(2) The impairment of Joanne's ability to execute and foreclose on Siragusa's Medical Practice Interest pursuant to her Lien (the "Foreclosure Sale"), thereby:

(a) Depriving Joanne of her right to conduct and bid at the Foreclosure Sale and thereby become the owner of Siragusa's Medical Practice Interest.

(b) With the resulting loss of the rights and privileges of ownership of Siragusa's Medical Practice Interest, including especially but without limitation (i) the share of the substantial Profits properly attributable to Siragusa's Medical Practice Interest and (ii) the ability to sell that Medical Practice Interest at its fair market value, all for the period of time between the acts which give rise to this claim for relief and the trial of this matter.

(3) The expenses to prosecute this action, including especially but without limitation the fees and costs of investigation and litigation, all as authorized by law.

(4) All interest due thereon.

B. With respect to the Bankruptcy Estate:

(1) The loss of the rights and interests in Siragusa's Medical Practice Interest which the Bankruptcy Estate was properly entitled to receive under the Bankruptcy Code, thereby depriving the Bankruptcy Estate of the rights and privileges of ownership of Siragusa's Medical Practice Interest, including especially but without limitation (i) the share of the substantial Profits

properly attributable to Siragusa's Medical Practice Interest and (ii) the ability to sell that Medical Practice Interest at its fair market value, all for the period of time between the acts which give rise to this claim for relief and the trial of this matter.

(2) The expenses to prosecute this action, including especially but without limitation the fees and costs of investigation and litigation, all as authorized by law.

(3) All interest due thereon.

163. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards Joanne and the Bankruptcy Estate as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

SECOND CLAIM FOR RELIEF

(Violation of 18 U.S.C. 1962(c), including aiding and abetting liability under 18 U.S.C. 2)

164. Plaintiffs reallege each of the foregoing paragraphs.

165. Joanne, the Trustee, and Defendants Brown and Beckley (and certain unknown Does), and each of the Participants are "persons" within the meaning of 18 U.S.C. 1961(3) and 1964(c).

166. The Medical Practice, consisting of its various component entities, including primarily but without limitation HIN, CAN, HICL and HIP at the primary 1090 E.

Desert Inn Road, Clark County, Nevada location and at all of the other locations utilized for the conduct of the Medical Practice within and outside of the State of Nevada is (i) the Enterprise which is the subject of this complaint and (ii) an "association in fact enterprise" within the meaning of 18 U.S.C. 1961(4) and 1962(c), which Enterprise was engaged in and the activities of which affected interstate commerce during the Relevant Times.

167. Defendants Brown and Beckley (and certain unknown Does) and the various Participants, including especially Bowers and Siragusa, each knowingly, intentionally, willfully and unlawfully (i) were employed by or associated with the Medical Practice Enterprise and (ii) conducted or participated, directly or indirectly, in the conduct of its affairs through a pattern of Racketeering Activity, or aided and abetted others in doing so, all in violation of 18 U.S.C. 1962(c).

168. The pattern of Racketeering Activity included the following:

A. Multiple instances of bankruptcy fraud in violation of 18 U.S.C. 152.

B. Multiple instances of mail fraud in violation of 18 U.S.C. 1341.

C. Multiple instances of mail fraud in violation of 18 U.S.C. 1341.

D. Multiple instances of obstruction of justice in violation of 18 U.S.C. 1503.

E. Multiple instances of fraud in the sale of securities punishable under the laws of the United States

in violation of Sections 12(2), 15 and 17 of the Securities Act of 1933, as amended, (ii) Sections 10(b) and 20 of the Securities Exchange Act of 1934, as amended, and (iii) Securities and Exchange Commission Rule 10-b5, 17 CFR 240.10b-5 (1991).

169. As a direct and proximate result of the pattern of Racketeering Activity, Joanne and the Bankruptcy Estate have suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof and should be trebled pursuant to 18 U.S.C. 1964(c). These damages especially include without limitation the items described in detail in the first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

170. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards Joanne and the Bankruptcy Estate as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

THIRD CLAIM FOR RELIEF

(Violation of 18 U.S.C. 1962(d) by conspiracy to violate 18 U.S.C. 1962(c) and 1962(b))

171. Plaintiffs reallege each of the foregoing paragraphs.

172. Joanne, the Trustee, and Defendants Brown and Beckley (and certain unknown Does), and each of the

Participants are "persons" within the meaning of 18 U.S.C. 1961(3) and 1964(c).

173. The Medical Practice, consisting of its various component entities, including primarily but without limitation HIN, CAN, HICL and HIP at the primary 1090 E. Desert Inn Road, Clark County, Nevada location and at all of the other locations utilized for the conduct of the Medical Practice within and outside of the State of Nevada is (i) the Enterprise which is the subject of this complaint and (ii) an "association in fact enterprise" within the meaning of 18 U.S.C. 1961(4), 1962(b) and 1962(c), which Enterprise was engaged in and the activities of which affected interstate commerce during the Relevant Times.

175. Defendants Brown and Beckley (and certain unknown Does) and the various Participants, including especially Bowers and Siragusa, each knowingly, intentionally, willfully and unlawfully (i) agreed and conspired within the meaning of 18 U.S.C. 1962(d) to violate 18 U.S.C. 1962(b) and 1962(c) through a pattern of Racketeering Activity and (ii) committed many overt acts in furtherance thereof as described herein.

176. The pattern of Racketeering Activity included the following:

A. Multiple instances of bankruptcy fraud in violation of 18 U.S.C. 152.

B. Multiple instances of mail fraud in violation of 18 U.S.C. 1341.

C. Multiple instances of wire fraud in violation of 18 U.S.C. 1343.

D. Multiple instances of obstruction of justice in violation of 18 U.S.C. 1503.

E. Multiple instances of fraud in the sale of securities punishable under the laws of the United States in violation of Sections 12(2), 15 and 17 of the Securities Act of 1933, as amended, (ii) Sections 10(b) and 20 of the Securities Exchange Act of 1934, as amended, and (iii) Securities and Exchange Commission Rule 10-b5, 17 CFR 240.10b-5 (1991).

177. As a direct and proximate result of the conspiracy and predicate acts of Racketeering Activity in furtherance thereof, Joanne and the Bankruptcy Estate have suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof and should be trebled pursuant to 18 U.S.C. 1964(c). These damages especially include without limitation the items described in detail in the first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

178. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards Joanne and the Bankruptcy Estate as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

FOURTH CLAIM FOR RELIEF

(Nevada RICO Violation of N.R.S. 207.400(1)(b))

179. Plaintiffs reallege each of the foregoing paragraphs.

180. Joanne, the Trustee, and Defendants Brown and Beckley (and certain unknown Does), and each of the Participants are "persons" within the meaning of N.R.S. 207.400.

181. The Medical Practice, consisting of its various component entities, including primarily but without limitation HIN, CAN, HICL and HIP at the primary 1090 E. Desert Inn Road, Clark County, Nevada location and at all of the other locations utilized for the conduct of the Medical Practice within and outside of the State of Nevada is (i) the Enterprise which is the subject of this complaint and (ii) an "association in fact enterprise" within the meaning of N.R.S. 207.380.

182. The Participants, including especially Bowers and Siragusa, each knowingly, intentionally, willfully and unlawfully acquired and/or maintained an interest in or control of the Medical Practice Enterprise through the Racketeering Activity set forth above, all in violation of N.R.S. 207.400(1)(b).

183. The various Participants acted directly as principals. Defendants Brown and Beckley (and certain unknown Does) were also principals within the meaning of N.R.S. 195.020 as they knowingly, intentionally, willfully and unlawfully rendered substantial assistance to the various Participants by aiding, abetting, counselling,

and inducing them to violate N.R.S. 207.400(1)(b) ("aiding and abetting").

184. The Racketeering Activity through which the Participants, aided and abetted by Defendants Brown and Beckley (and certain unknown Does), acquired and/or maintained an interest in or control of the Medical Practice Enterprise included the following:

A. Multiple instances of grand larceny in violation of N.R.S. 207.360(16) and 205.220.

B. Multiple instances of embezzlement in violation of N.R.S. 207.360(25) and 205.300.

C. Multiple instances of obtaining money or property by false pretenses in violation of N.R.S. 207.360(26) and 205.380.

D. Multiple instances of perjury or subornation of perjury in violation of N.R.S. 207.360(27) and 199.200.

E. Multiple instances of offering false evidence in violation of N.R.S. 207.360(28) and 199.210.

F. Multiple instances of securities fraud in violation of N.R.S. 207.360(30) and 90.570.

185. As a direct and proximate result of the N.R.S. 207.400(1)(b) violation, Joanne and the Bankruptcy Estate have suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof and should be trebled pursuant to N.R.S. 207.470(1). These damages especially include without limitation the items described in detail in the

first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

186. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards Joanne and the Bankruptcy Estate as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

FIFTH CLAIM FOR RELIEF

(Nevada RICO Violation of N.R.S. 207.400(1)(c))

187. Plaintiffs reallege each of the foregoing paragraphs.

188. Joanne, the Trustee, and Defendants Brown and Beckley (and certain unknown Does), and each of the Participants are "persons" within the meaning of N.R.S. 207.400.

189. The Medical Practice, consisting of its various component entities, including primarily but without limitation HIN, CAN, HICL and HIP at the primary 1090 E. Desert Inn Road, Clark County, Nevada location and at all of the other locations utilized for the conduct of the Medical Practice within and outside of the State of Nevada is (i) the Enterprise which is the subject of this complaint and (ii) an "association in fact enterprise" within the meaning of N.R.S. 207.380.

190. Defendants Brown and Beckley (and certain unknown Does) and the various Participants, including especially Bowers and Siragusa, each knowingly, intentionally, willfully and unlawfully:

A. Were employed by or associated with the Medical Practice Enterprise; and

B. Conducted or participated, directly or indirectly, in the affairs of the Enterprise through the Racketeering Activity, or aided and abetted others in doing so, all in violation of N.R.S. 207.400(1)(c)(1); and/or

C. Conducted or participated, directly or indirectly, in the Racketeering Activity through the affairs of the Enterprise, or aided and abetted others in doing so, all in violation of N.R.S. 207.400(1)(c)(2).

191. The Racketeering Activity included the following:

A. Multiple instances of grand larceny in violation of N.R.S. 207.360(16) and 205.220.

B. Multiple instances of embezzlement in violation of N.R.S. 207.360(25) and 205.300.

C. Multiple instances of obtaining money or property by false pretenses in violation of N.R.S. 207.360(26) and 205.380.

D. Multiple instances of perjury or subornation of perjury in violation of N.R.S. 207.360(27) and 199.200.

E. Multiple instances of offering false evidence in violation of N.R.S. 207.360(28) and 199.210.

F. Multiple instances of securities fraud in violation of N.R.S. 207.360(30) and 90.570.

192. As a direct and proximate result of the Racketeering Activity, Joanne and the Bankruptcy Estate have suffered damages in an amount currently exceeding $6

million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof and should be trebled pursuant to N.R.S. 207.470(1). These damages especially include without limitation the items described in detail in the first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

193. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards Joanne and the Bankruptcy Estate as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

SIXTH CLAIM FOR RELIEF

(Nevada RICO violation of N.R.S. 207.400(1)(h) by conspiracy to violate N.R.S. 207.400(1)(b) and N.R.S. 207.400(1)(c))

194. Plaintiffs reallege each of the foregoing paragraphs.

195. Joanne, the Trustee, and Defendants Brown and Beckley (and certain unknown Does), and each of the Participants are "persons" within the meaning of N.R.S. 207.400.

196. The Medical Practice, consisting of its various component entities, including primarily but without limitation HIN, CAN, HICL and HIP at the primary 1090 E. Desert Inn Road, Clark County, Nevada location and at all of the other locations utilized for the conduct of the

Medical Practice within and outside of the State of Nevada is (i) the Enterprise which is the subject of this complaint and (ii) an "association in fact enterprise" within the meaning of N.R.S. 207.380.

197. Defendants Brown and Beckley (and certain unknown Does) and the various Participants, including especially Bowers and Siragusa, each knowingly, intentionally, willfully and unlawfully (i) agreed and conspired within the meaning of N.R.S. 207.400(1)(h) to violate N.R.S. 207.400(1)(b) and 207.400(1)(c) through the Racketeering Activity and (ii) committed many overt acts in furtherance thereof as described herein.

198. The Racketeering Activity included the following:

A. Multiple instances of grand larceny in violation of N.R.S. 207.360(16) and 205.220.

B. Multiple instances of embezzlement in violation of N.R.S. 207.360(25) and 205.300.

C. Multiple instances of obtaining money or property by false pretenses in violation of N.R.S. 207.360(26) and 205.380.

D. Multiple instances of perjury or subornation of perjury in violation of N.R.S. 207.360(27) and 199.200.

E. Multiple instances of offering false evidence in violation of N.R.S. 207.360(28) and 199.210.

F. Multiple instances of securities fraud in violation of N.R.S. 207.360(30) and 90.570.

199. As a direct and proximate result of such misconduct, Joanne and the Bankruptcy Estate have suffered

damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof and should be trebled pursuant to N.R.S. 207.470(1). These damages especially include without limitation the items described in detail in the first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

200. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards Joanne and the Bankruptcy Estate as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

SEVENTH CLAIM FOR RELIEF

(Fraud And Conspiracy Against Joanne)

201. Joanne realleges each of the foregoing paragraphs.

202. At all Relevant Times, Joanne had the above described rights in Siragusa's Medical Practice Interest.

203. At various times since the Decree of Divorce was entered in 1983, Siragusa falsely informed Joanne that the financial condition of the Medical Practice had become so bad that Siragusa could not possibly make the required Marital Payments and fraudulently induced Joanne to agree to a reduction in the Marital Payments, even though Siragusa could at all such and other times have readily made the required Marital Payments. The last time Siragusa fraudulently so induced Joanne to

agree to a reduction in the required Marital Payments was between November 1986 and January 1987.

204. Around May 1987, Siragusa (i) once again falsely informed Joanne of non-existent financial problems with the Medical Practice and (ii) totally ceased making any Marital Payments, even though the Medical Practice was financially stronger than it had ever been and Siragusa could have readily made the required Marital Payments at that time.

205. Around July 6, 1987, Joanne filed the Arrearages Motion in the Divorce Proceedings to reduce the past due Marital Payment and other arrearages to judgment.

206. Siragusa unsuccessfully attempted to defend Joanne's Arrearages Motion between July and September 1987 on the false grounds that the Medical Practice were having severe financial difficulties. In doing so, Siragusa expressly represented to the court in the Divorce Proceedings that Siragusa needed the requested relief from Joanne's motion to preserve Siragusa's Medical Practice Interests which were then existing in the Medical Practice.

207. Defendant Brown also represented to Joanne during this period that Siragusa was still the holder of his Medical Practice Interest.

208. On September 10, 1987, the domestic relations referee entered his findings and recommendations in the Divorce Proceedings that Joanne was entitled to judgment against Siragusa in an amount then in excess of $1,400,000 for Marital Payment and other arrearages.

209. Siragusa objected to these findings and recommendations, and the matter was finally heard by the Divorce Court on November 5, 1987. That court fully adopted the referee's findings and recommendations, reduced the Marital Payment arrearages to judgment, and stayed enforcement of the judgment until November 12, 1987 to give Siragusa time to consult with counsel about an undertaking on appeal to preserve his Medical Practice Interests.

210. Prior to that next Divorce Proceedings hearing, Siragusa filed his Bankruptcy Petition on November 10, 1987.

211. The Fraudulent Course of Conduct, including especially but without limitation the False Joanne Representations and the other misconduct alleged in detail in Siragusa's Medical Practice Interest Scheme, all of which is herein incorporated by reference, and the additional false misrepresentations set forth in this claim for relief (the "Additional Joanne Misrepresentation"), constituted a fraud upon Joanne as such misrepresentations were materially false and (i) known to be false when they were made or (ii) made with reckless disregard as to their truthfulness. The true contrary facts were as is set forth herein.

212. The False Joanne Representations, the Additional False Joanne Representations, and the other misconduct alleged in detail in Siragusa's Medical Practice Interest Scheme were material and intended to induce action or inaction on the part of Joanne as described herein.

213. Joanne justifiably and reasonably relied upon the False Joanne Representations, the Additional False Joanne Representations, and the other misconduct alleged in detail in Siragusa's Medical Practice Interest Scheme until it was subsequently discovered in December 1990 that Defendants Brown and Beckley's Addendum to Statement of Affairs (i) contained a fraudulent description of the transactions and events which had occurred in connection with the Reorganization and (ii) contained and was based on documents which were backdated, otherwise fraudulent, and not given actual effect among the nominal parties thereto, all of which misconduct was intended to, and did, conceal the actual fraudulent nature of the Reorganization and the related Racketeering Activity. This False Information was part of the Obstruction of Justice in which Defendants Brown and Beckley (and certain unknown Does) and certain of the Participants further destroyed documents and otherwise concealed assets and information from, and provided false responsive testimony to, Joanne and the Trustee throughout the Bankruptcy Case and the Adversary Proceeding (as well as the Divorce Proceedings).

214. Defendants Brown and Beckley (and certain unknown Does) and the various Participants in concert (i) formed a common plan and design to defraud Joanne out of her legitimate rights and interests in Siragusa's Medical Practice Interest through the Fraudulent Course of Conduct, which included without limitation the False Joanne Representations and the Additional False Joanne Representations, and (ii) actively participated in, aided, abetted, ratified and adopted for their own improper

purposes the actions of the others in furtherance of this conspiracy, all:

A. With a malicious intent to harm Joanne.

B. By unlawful means to accomplish the goal of the conspiracy.

C. Utilizing the force of the number of members of the conspiracy as well as their vastly superior financial resources.

215. As a direct and proximate result of such misconduct, Joanne has suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof. These damages especially include without limitation the items described in detail with respect to Joanne in the first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

216. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards Joanne as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

EIGHTH CLAIM FOR RELIEF

(Fraud And Conspiracy Against the Bankruptcy Estate)

217. The Trustee realleges each of the foregoing paragraphs.

218. At all Relevant Times, the Bankruptcy Estate had the above described rights in Siragusa's Medical Practice Interest.

219. The Fraudulent Course of Conduct, including especially but without limitation the False Trustee Representations and the other misconduct alleged in detail in Siragusa's Medical Practice Interest Scheme, all of which is herein incorporated by reference, constituted a fraud upon the Bankruptcy Estate as such misrepresentations were materially false and (i) known to be false when they were made or (ii) made with reckless disregard as to their truthfulness. The true contrary facts were as is set forth herein.

220. The False Trustee Representations and the other misconduct alleged in detail in Siragusa's Medical Practice Interest Scheme were material and intended to induce action or inaction on the part of the Bankruptcy Estate as described herein.

221. The Bankruptcy Estate justifiably and reasonably relied upon the False Trustee Representations and the other misconduct alleged in detail in Siragusa's Medical Practice Interest Scheme until it was subsequently discovered in December 1990 that Defendants Brown and Beckley's Addendum to Statement of Affairs (i) contained a fraudulent description of the transactions and events which had occurred in connection with the Reorganization and (ii) contained and was based on documents which were backdated, otherwise fraudulent, and not given actual effect among the nominal parties thereto, all of which misconduct was intended to, and did, conceal the actual fraudulent nature of the Reorganization and

the related Racketeering Activity. This False Information was part of the Obstruction of Justice in which Defendants Brown and Beckley (and certain unknown Does) and certain of the Participants further destroyed documents and otherwise concealed assets and information from, and provided false responsive testimony to, Joanne and the Trustee throughout the Bankruptcy Case and the Adversary Proceeding (as well as the Divorce Proceedings).

222. Defendants Brown and Beckley (and certain unknown Does) and the various Participants in concert (i) formed a common plan and design to defraud the Bankruptcy Estate out of its legitimate rights and interests in Siragusa's Medical Practice Interest through the Fraudulent Course of Conduct, which included without limitation the False Trustee Representations, and (ii) actively participated in, aided, abetted, ratified and adopted for their own improper purposes the actions of the others in furtherance of this conspiracy, all:

A. With a malicious intent to harm the Bankruptcy Estate.

B. By unlawful means to accomplish the goal of the conspiracy.

C. Utilizing the force of the number of members of the conspiracy as well as their vastly superior financial resources.

223. As a direct and proximate result of such misconduct the Bankruptcy Estate has suffered damages in

an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof. These damages especially include without limitation the items described in detail with respect to the Bankruptcy Estate in the first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

224. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards the Bankruptcy Estate as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

NINTH CIRCUIT FOR RELIEF

(Prejudicing/Defrauding Joanne as a Lien Creditor and Conspiracy)

225. Joanne realleges each of the foregoing paragraphs.

226. At all Relevant Times, Joanne had the above described rights in Siragusa's Medical Practice Interest, which included without limitation her Lien which was a valid and perfected senior security interest against Siragusa's Medical Practice Interest (the "Collateral") to secure the Marital Payments and all of Siragusa's other obligations to Joanne under the Decree of Divorce.

227. Defendants Brown and Beckley (and certain unknown Does) and the various Participants each (i) had full knowledge of the existence of Joanne's Lien and the rights and entitlements of Joanne created thereunder and

(ii) knowingly, intentionally, willfully and unlawfully helped plan, develop and implement the impairment, disruption and destruction of Joanne's Lien and the underlying Medical Practice Interest Collateral (the "Lien/Collateral Destruction") through the Fraudulent "Lien/Collateral Destruction") through the Fraudulent Course of Conduct, including especially but without limitation the Reorganization.

228. Such misconduct impaired and disrupted and purportedly destroyed (i) the underlying Medical Practice Interest Collateral and (ii) the validity of the Lien and Joanne's ability to enforce her legitimate rights and interests thereunder.

229. Defendants Brown and Beckley (and certain unknown Does) and the various Participants in concert (i) formed a common plan and design to defraud Joanne out of her legitimate rights and interests in Siragusa's Medical Practice Interest, including without limitation her Lien and the underlying Siragusa Medical Practice Interest Collateral, through the Fraudulent Course of Conduct which included the Lien/Collateral Destruction, and (ii) actively participated in, aided, abetted, ratified and adopted for their own improper purposes the actions of the others in furtherance of this conspiracy, all:

A. With a malicious intent to harm Joanne.

B. By unlawful means to accomplish the goal of the conspiracy.

C. Utilizing the force of the number of members of the conspiracy as well as their vastly superior financial resources.

230. As a direct and proximate result of such misconduct, Joanne has suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof. These damages especially include without limitation the items described in detail with respect to Joanne in the first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

231. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards Joanne as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

TENTH CLAIM FOR RELIEF

(Intentional Interference With Joanne's Contractual Relations And Conspiracy)

232. Joanne realleges each of the foregoing paragraphs.

233. At all Relevant Times, Joanne had the above described rights, including without limitation the right to receive the Marital Payments, under the Decree of Divorce and the related Property Settlement Agreement, Security Agreement and other instruments, (collectively the "Joanne's Contract Rights") which were valid and binding judicially imposed contracts between Joanne and Siragusa.

234. Defendants Brown and Beckley (and certain unknown Does) and the various Participants each (i) had

full knowledge of the existence of Joanne's Contract Rights and (ii) knowingly, intentionally, willfully and unlawfully helped plan, develop and implement the impairment, disruption and destruction of Joanne's Contract Rights (the "Joanne's Contract Rights Destruction") through the Fraudulent Course of Conduct, including especially but without limitation the Reorganization.

235. Such misconduct impaired and disrupted and purportedly destroyed Joanne's Contract Rights.

236. Defendants Brown and Beckley (and certain unknown Does) and the various Participants in concert (i) formed a common plan and design to defraud Joanne out of her legitimate rights and interests in Siragusa's Medical Practice Interest, including without limitation Joanne's Contract Rights, through the Fraudulent Course of Conduct which included Joanne's Contract Rights Destruction, and (ii) actively participated in, aided, abetted, ratified and adopted for their own improper purposes the actions of the others in furtherance of this conspiracy, all:

A. With a malicious intent to harm Joanne.

B. By unlawful means to accomplish the goal of the conspiracy.

C. Utilizing the force of the number of members of the conspiracy as well as their vastly superior financial resources.

237. As a direct and proximate result of such misconduct, Joanne has suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial

of this matter and full payment thereof. These damages especially include without limitation the items described in detail with respect to Joanne in the first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

238. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards Joanne as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

ELEVENTH CLAIM FOR RELIEF

(Interference With Joanne's Prospective Economic Advantage and Conspiracy)

239. Joanne realleges each of the foregoing paragraphs.

240. At all Relevant Times, Joanne had the above described rights, including without limitation the right to receive the Marital Payments, under the Decree of Divorce and the related Property Settlement Agreement, Security Agreement and other instruments, (collectively the "Joanne's Contract Rights") which were valid and binding judicially imposed contracts between Joanne and Siragusa.

241. Joanne's Contract Rights included without limitation the right to (i) execute and foreclose on Siragusa's Medical Practice Interest Collateral pursuant to the Lien (the "Foreclosure Sale") and (ii) conduct and bid at the

Foreclosure Sale and thereby become the owner of Siragusa's Medical Practice Interest Collateral (the "Prospective Economic Advantage").

242. Defendants Brown and Beckley (and certain unknown Does) and the various Participants each (i) had full knowledge of the existence of Joanne's Contract Rights and Prospective Economic Advantage, including without limitation her right to conduct and bid at the Foreclosure Sale and thereby become the owner of Siragusa's Medical Practice Interests Collateral, and (ii) knowingly, intentionally, willfully and unlawfully helped plan, develop and implement the impairment, disruption and destruction of Joanne's Contract Rights and Prospective Economic Advantage (the "Contract Rights/Advantage Destruction") through the Fraudulent Course of Conduct, including especially but without limitation the Reorganization.

243. Such misconduct impaired and disrupted and purportedly destroyed Joanne's Contract Rights and did actually impair, disrupt and destroy Joanne's Prospective Economic Advantage, including without limitation her ability to conduct and bid at the Foreclosure Sale and thereby become the owner of Siragusa's Medical Practice Interest Collateral.

244. But for the Contract Rights/Advantage Destruction, Joanne (i) would have conducted and been successful in bidding at the Foreclosure Sale and (ii) thereby become the owner of Siragusa's Medical Practice Interest Collateral.

245. The Contract Rights/Advantage Destruction was intended to prevent, and did prevent, Joanne from

obtaining her Prospective Economic Advantage with respect to Siragusa's Medical Practice Interest Collateral.

246. The Contract Rights/Advantage Destruction was not privileged or justified in any manner.

247. Defendants Brown and Beckley (and certain unknown Does) and the various Participants in concert (i) formed a common plan and design to defraud Joanne out of her legitimate rights and interests in Siragusa's Medical Practice Interest, including without limitation Joanne's Contract Rights and Prospective Economic Advantage, through the Fraudulent Course of Conduct which included the Contract Rights/Advantage Destruction to prevent Joanne from obtaining the Prospective Economic Advantage, and (ii) actively participated in, aided, abetted, ratified and adopted for their own improper purposes the actions of the others in furtherance of this conspiracy, all:

A. With a malicious intent to harm Joanne.

B. By unlawful means to accomplish the goal of the conspiracy.

C. Utilizing the force of the number of members of the conspiracy as well as their vastly superior financial resources.

248. As a direct and proximate result of such misconduct, Joanne has suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof. These damages especially include without limitation the items described in detail with respect to Joanne in the first claim for relief,

which damages items are herein incorporated by reference into this claim for relief.

249. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards Joanne as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

TWELFTH CLAIM FOR RELIEF

(Intentional Interference With the Bankruptcy Estate's Contractual Relations And Conspiracy)

250. The Trustee realleges each of the foregoing paragraphs.

251. At all Relevant Times, Siragusa had the above described ownership and other rights in his Medical Practice Interest and Siragusa Ltd which constituted valid and binding contracts between Siragusa and the various entities comprising the Medical Practice Enterprise (collectively the "Siragusa Contract Rights").

252. Upon the filing of Siragusa's Bankruptcy Petition, all of Siragusa's assets, including especially but without limitation Siragusa's Contract Rights, became the property of Siragusa's Bankruptcy Estate under the Bankruptcy Code (collectively the "Bankruptcy Estate's Contract Rights").

253. Defendants Brown and Beckley (and certain unknown Does) and the various Participants each (i) had full knowledge of the existence of the Bankruptcy Estate's

Contract Rights and (ii) knowingly, intentionally, willfully and unlawfully helped plan, develop and implement the impairment, disruption and destruction of the Bankruptcy Estate's Contract Rights (the "Bankruptcy Estate's Contract Rights Destruction") through the Fraudulent Course of Conduct, including especially but without limitation the Reorganization.

254. Such misconduct impaired and disrupted and purportedly destroyed Bankruptcy Estate's Contract Rights.

255. Defendants Brown and Beckley (and certain unknown Does) and the various Participants in concert (i) formed a common plan and design to defraud Bankruptcy Estate out of its legitimate rights and interests in Siragusa's Medical Practice Interest, including without limitation the Bankruptcy Estate's Contract Rights, through the Fraudulent Course of Conduct which included the Bankruptcy Estate's Contract Rights Destruction, and (ii) actively participated in, aided, abetted, ratified and adopted for their own improper purposes the actions of the others in furtherance of this conspiracy, all:

A. With a malicious intent to harm the Bankruptcy Estate.

B. By unlawful means to accomplish the goal of the conspiracy.

C. Utilizing the force of the number of members of the conspiracy as well as their vastly superior financial resources.

256. As a direct and proximate result of such misconduct the Bankruptcy Estate has suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof. These damages especially include without limitation the items described in detail with respect to the Bankruptcy Estate in the first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

257. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards the Bankruptcy Estate as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

THIRTEENTH CLAIM FOR RELIEF

(Conversion and Conspiracy Against Joanne)

258. Joanne realleges each of the foregoing paragraphs.

259. At all Relevant Times, Joanne had the above described rights in Siragusa's Medical Practice Interest, which included without limitation under the provisions of the Lien and Security Agreement the right to immediate possession of, and an ownership interest in, Siragusa's Medical Practice Interest Collateral (collectively the "Joanne's Right to Possession") upon any default by Siragusa of his obligations thereunder, including especially but without limitation in making the required Marital Payments.

260. When Siragusa failed to make the required Marital Payments, he became in default under the provisions of the Lien and Security Agreement (the "Default") and Joanne immediately became entitled to Joanne's Right to Possession of Siragusa's Medical Practice Interest Collateral.

261. After Siragusa's Default, Defendants Brown and Beckley (and certain unknown Does) and the various Participants knowingly, intentionally, willfully, and unlawfully exerted dominion and control over Siragusa's Medical Practice Interest Collateral and converted the same to their own use and possession (the "Joanne Conversion Actions") through the Fraudulent Course of Conduct, including especially but without limitation the Reorganization.

262. The Joanne Conversion Actions constituted a serious interference with Joanne's Right to Possession of Siragusa's Medical Practice Interest Collateral in denial of, inconsistent with, and in defiance of, Joanne's Right to Possession thereof.

263. Defendants Brown and Beckley (and certain unknown Does) and the various Participants in concert (i) formed a common plan and design to defraud Joanne out of her legitimate rights and interests in Siragusa's Medical Practice Interest, including without limitation Joanne's Contract Rights and Prospective Economic Advantage, through the Fraudulent Course of Conduct which included the Joanne's Conversion Actions, and (ii) actively participated in, aided, abetted, ratified and adopted for their own improper purposes the actions of the others in furtherance of this conspiracy, all:

A. With a malicious intent to harm Joanne.

B. By unlawful means to accomplish the goal of the conspiracy.

C. Utilizing the force of the number of members of the conspiracy as well as their vastly superior financial resources.

264. As a direct and proximate result of such misconduct, Joanne has suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof. These damages especially include without limitation the items described in detail with respect to Joanne in the first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

265. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards Joanne as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

FOURTEENTH CLAIM FOR RELIEF

(Conversion and Conspiracy Against The Bankruptcy Estate)

266. The Trustee realleges each of the foregoing paragraphs.

267. At all Relevant Times, Siragusa had the above described ownership and other rights in his Medical Practice Interest and Siragusa Ltd which constituted valid and binding contracts between Siragusa and the various

entities comprising the Medical Practice Enterprise (collectively the "Siragusa Contract Rights").

268. Upon the filing of Siragusa's Bankruptcy Petition, all of Siragusa's assets, including especially but without limitation Siragusa's Contract Rights, became the property of Siragusa's Bankruptcy Estate under the Bankruptcy Code, which included without limitation the right to immediate possession of, and an ownership interest in, Siragusa's Medical Practice Interest Collateral (collectively the "Bankruptcy Estate's Right to Possession").

269. After the filing of Siragusa's Bankruptcy Petition, Defendants Brown and Beckley (and certain unknown Does) and the various Participants knowingly, intentionally, willfully, and unlawfully exerted dominion and control over Siragusa's Medical Practice Interest Collateral and converted the same to their own use and possession (the "Bankruptcy Estate Conversion Actions") through the Fraudulent Course of Conduct, including especially but without limitation the Reorganization.

270. The Bankruptcy Estate Conversion Actions constituted a serious interference with the Bankruptcy Estate's Right to Possession of Siragusa's Medical Practice Interest Collateral in denial of, inconsistent with, and in defiance of, the Bankruptcy Estate's Right to Possession thereof.

271. Defendants Brown and Beckley (and certain unknown Does) and the various Participants in concert (i) formed a common plan and design to defraud Bankruptcy Estate out of its legitimate rights and interests in Siragusa's Medical Practice, including without limitation the Bankruptcy Estate's Right to Possession, through the

Fraudulent Course of Conduct which included the Bankruptcy Estate Conversion Actions, and (ii) actively participated in, aided, abetted, ratified and adopted for their own improper purposes the actions of the others in furtherance of this conspiracy, all:

A. With a malicious intent to harm the Bankruptcy Estate.

B. By unlawful means to accomplish the goal of the conspiracy.

C. Utilizing the force of the number of members of the conspiracy as well as their vastly superior financial resources.

272. As a direct and proximate result of such misconduct the Bankruptcy Estate has suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof. These damages especially include without limitation the items described in detail with respect to the Bankruptcy Estate in the first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

273. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards the Bankruptcy Estate as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

FIFTEENTH CLAIM FOR RELIEF

(Conspiracy Against Joanne)

274. Joanne realleges each of the foregoing paragraphs.

275. At all Relevant Times, Joanne had the above described rights in Siragusa's Medical Practice Interest, which included without limitation her Lien.

276. Defendants Brown and Beckley (and certain unknown Does) and the various Participants in concert (i) formed a common plan and design to defraud Joanne out of her legitimate rights and interests in Siragusa's Medical Practice Interest through the Fraudulent Course of Conduct, including without limitation the Reorganization, and (ii) actively participated in, aided, abetted, ratified and adopted for their own improper purposes the actions of the others in furtherance of this conspiracy.

277. Defendants Brown and Beckley (and certain unknown Does) and the various Participants engaged in this conspiracy with a malicious intent to harm Joanne.

278. Defendants Brown and Beckley (and certain unknown Does) and the various Participants utilized unlawful means to accomplish the goal of this conspiracy, including without limitation the Reorganization.

279. Defendants Brown and Beckley (and certain unknown Does) and the various Participants utilized the force of the number of members of this conspiracy as well as their vastly superior financial resources to commit this conspiracy.

280. As a direct and proximate result of such misconduct, Joanne has suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof. These damages especially include without limitation the items described in detail with respect to Joanne in the first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

281. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards Joanne as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

SIXTEENTH CLAIM FOR RELIEF

(Conspiracy Against the Bankruptcy Estate)

282. The Trustee realleges each of the foregoing paragraphs.

283. At all Relevant Times, the Bankruptcy Estate had the above described rights in Siragusa's Medical Practice Interest.

284. Defendants Brown and Beckley (and certain unknown Does) and the various Participants in concert (i) formed a common plan and design to defraud the Bankruptcy Estate out of its legitimate rights and interests in Siragusa's Medical Practice Interest through the Fraudulent Course of Conduct, including without limitation the Reorganization, and (ii) actively participated in, aided, abetted, ratified and adopted for their own improper

purposes the actions of the others in furtherance of this conspiracy.

285. Defendants Brown and Beckley (and certain unknown Does) and the various Participants engaged in this conspiracy with a malicious intent to harm the Bankruptcy Estate.

286. Defendants Brown and Beckley (and certain unknown Does) and the various Participants utilized unlawful means to accomplish the goal of this conspiracy, including without limitation the Reorganization.

287. As a direct and proximate result of such misconduct the Bankruptcy Estate has suffered damages in an amount currently exceeding $6 million, which damages will continue to increase and accrue with the passage of time until trial of this matter and full payment thereof. These damages especially include without limitation the items described in detail with respect to the Bankruptcy Estate in the first claim for relief, which damages items are herein incorporated by reference into this claim for relief.

288. Defendants Brown and Beckley (and certain unknown Does) have acted so maliciously, fraudulently and oppressively towards the Bankruptcy Estate as to justify the imposition of punitive damages in an amount sufficient to punish and deter such misconduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this court:

1. Award to Joanne damages against Defendants Brown and Beckley, and each of them along with any Doe

Defendants who may subsequently be named, as set forth above and according to the proof at trial, including without limitation trebling of said damages, punitive damages, and reasonable fees and costs for investigating and prosecuting this action.

2. Award to the Trustee on behalf of the Bankruptcy Estate damages against Defendants Brown and Beckley, and each of them along with any Doe Defendants who may subsequently be named, as set forth above and according to the proof at trial, including without limitation trebling of said damages and punitive damages and reasonable fees and costs for investigating and prosecuting this action.

3. Grant Plaintiffs such other and further relief as appropriate.

JURY DEMAND

PLAINTIFFS HEREBY DEMAND A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

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GRIMMETT, ET AL V. BROWN, ET AL

Exhibit "1"

NON-EXCLUSIVE LISTING OF SPECIFIC ACTS CONSTITUTING (I) BANKRUPTCY FRAUD IN VIOLATION OF 18 USC 152, (II) GRAND LARCENY IN VIOLATION OF N.R.S. 207.360(16) AND 205.220, (III) EMBEZZLEMENT IN VIOLATION OF N.R.S. 207.360(25) AND 205.300, AND (IV) OBTAINING MONEY OR PROPERTY BY FALSE PRETENSES IN VIOLATION OF N.R.S. 207.360(26) AND 205.380

The Bankruptcy Petition prepared by Siragusa's bankruptcy counsel with the assistance of Defendants Brown and Beckley and filed on November 10, 1987 with the Bankruptcy Court was false and fraudulent in that (i) Siragusa was admittedly solvent and (ii) it was based on the false and fraudulent supporting filings described herein.

The Schedules and Statement of Affairs prepared by Siragusa's bankruptcy counsel with the direct assistance of Defendants Brown and Beckley and filed on November 10, 1987 with the Bankruptcy Court contained the following false and fraudulent representations to understate and conceal Siragusa's assets from the Trustee:

1. It failed to list Siragusa's Medical Practice Interests on Schedule B, but instead falsely stated in Schedule B-3 that Siragusa had made no assignment for the benefit of his creditors within the preceding year.

2. It failed to list in any manner the substantial profits and other distributions from Siragusa's Medical Practice Interests which Siragusa had received before and after the filing of his Bankruptcy Petition contrary to the disclosed terms of the purported Reorganization.

3. It failed to list on Schedule B (i) the funds which Siragusa had on hand and (ii) the other business interests which Siragusa had as of the filing of the Bankruptcy Petition.

4. It listed on Schedule A-2 the debt to HIN for Siragusa's negative capital account which was fabricated in connection with the Siragusa Termination portion of the fraudulent Reorganization.

5. It falsely listed in Schedules A-2 and A-3 the debts to the following creditors which were to be paid outside of the Bankruptcy Estate by Siragusa, Bowers and Heeren pursuant to the fraudulent Reorganization:

Creditors Names	Claim Amount ($)
California Federal	329,128.83
California Federal	20,277.43

First Interstate Bank of Nevada	9,972.00
Heart Institute of Nevada	37,400.00
Ford Motor Credit Co.	18,584.90
Valley Bank of Nevada	158,216.00
Security Bank of Nevada	190,000.00
MDFC Loan Corp.	547,414.00
Leasing Association of Barrington	140.059.00
TOTAL	1,451,052.16

6. It falsely stated in Statement of Affairs Item 2 that Siragusa was employed by his post-bankruptcy professional corporation which was an independent contractor with CAN.

7. It falsely stated in Statement of Affairs Item 7 that no other person was holding anything of value in which Siragusa had an interest.

8. It falsely stated in Statement of Affairs Item 9 that (i) no liquidating agent was holding anything of value in which Siragusa had an interest and (ii) Siragusa had not made any assignment for the benefit of his creditors within the preceding year.

9. It falsely stated in Statement of Affairs Item 12 that (i) Siragusa had made no gifts within the preceding year, (ii) a security interest in Siragusa's tangible personal property had been given to HIN for the Siragusa Termination debt, and (iii) the Siragusa Termination was explained in the Addendum to Statement of Affairs prepared by Defendants Brown and Beckley.

10. It falsely stated at the end thereof that Siragusa had no executory contracts.

The Addendum to Statement of Affairs prepared by Defendants Brown and Beckley and (i) submitted to the Trustee as the representative of Vincent Siragusa's Bankruptcy Estate around December 14, 1987 and (ii) filed with the Bankruptcy Court around January 13, 1988 by which Defendants Brown and Beckley expressly undertook to "explain the history and nature of the Heart Institute of Nevada, and Dr. Siragusa's participation therein" contained the following false and fraudulent representations and documents, each of which constituted a fraud upon and concealment from the Bankruptcy Estate and its Trustee. References are to numbered paragraphs in, and attached document exhibit numbered tabs of, the December 14, 1987 letter from Defendants Brown and Beckley to the Trustee for the purpose of misleading and concealing from the Trustee Siragusa's Medical Practice Interest:

Paragraph	Why False and Fraudulent
Intro:	Asserts the enclosed documents "explain the history and nature of the Heart Institute of Nevada, and Dr. Siragusa's participation therein", when in fact those documents are false, incomplete and contrary to the affidavit and deposition testimony of Heeren, Bowers, Brown, Lamoreaux and others (collectively the "Testimony"), other documents provided at that time and in discovery (the "Other Documents"), and the manner in which Siragusa was financially and otherwise actually treated.
#1:	The purported historical documents after 1986 are backdated and not given effect by Bowers, Heeren or

Siragusa. Further, these documents are incomplete and inconsistent with the Testimony and Other Documents.

#2: HIP had actual and constructive knowledge of, and consented to, Joanne's Security Agreement at all times since before its execution.

#3: This materially overstates HICL's debt which was paid off shortly after the Addendum was filed.

#4: The Medical Practice agreements did not contain, and Bowers, Siragusa, and Heeren did not generally follow, the partnership transfer restrictions described.

#5: The attached Reorganization 'booklet' was prepared as part of the efforts to avoid Siragusa's obligations to Joanne.

#7: Brown, Bowers, and Heeren as well as Siragusa actually and constructively knew of Joanne's Security Agreement since it was executed in 1984.

#8 & 10: When Brown, Bowers, and Heeren as well as Siragusa first learned around June 1987 that Joanne would be enforcing her Security Agreement (of which they were previously well aware), they attempted to falsely convince Joanne and the Divorce Court that HIN and Siragusa were financially insolvent; it is only after those efforts were unsuccessful that they created and backdated the various Siragusa Termination notices which were submitted to the Trustee to mislead him into believing that the purported Siragusa Termination had occurred.

#9: Siragusa's resignation was never demanded, given or accepted and his purported Termination was never given effect.

#11: The Reorganization events described did not occur in the timing and sequence described, if at all, and involved documents which were created and backdated as part of the efforts to avoid Siragusa's obligations to Joanne.

#12: The reasons given for the HIN Dissolution in which HIN's medical practice was transferred to CAN are false, incomplete and contrary to the Testimony and the Other Documents, and the manner in which Siragusa and Heeren were financially and otherwise actually treated. Similarly, the attached employment documents with respect to Siragusa are backdated, incomplete, inconsistent among themselves and with the Other Documents, and were never given effect. Further, the attached lease documents are backdated, incomplete, and inconsistent among themselves and with the Other Documents.

#13: The description of and reasons given for the HIN Dissolution and medical practice transfer are false, incomplete and contrary to the Testimony, the Other Documents, and the manner in which Siragusa and Heeren were actually treated financially and otherwise. The Dissolution/practice transfer document provided was backdated and is inconsistent with the Other Documents and was not given effect.

#14: Vincent Siragusa, MD, Ltd was incorporated to avoid Siragusa's obligations to Joanne. It did not terminate as of Siragusa's Bankruptcy Petition, but rather it still owned his HIN medical practice interest and became an asset of his Bankruptcy Estate.

#15: The HIN accounts receivable procedures described is inconsistent with Siragusa's purported Termination and were undertaken to implement the Reorganization side agreement to keep paying Siragusa his share of profits and distributions despite the paper Reorganization. Substantial amounts of such funds were being distributed to Siragusa at that post-bankruptcy time, but were not disclosed to the Trustee.

#16: The HIN, HIP and HICL financial statements were prepared well after Siragusa's purported Termination based on accelerated tax oriented concepts which bore no relationship to the true substantial economic worth of Siragusa's Medical Practice Interests.

#17: The HIP refinancing and appraisal were part of the efforts to avoid Siragusa's obligations to Joanne. The sale agreement was backdated and is inconsistent with Other Documents relating to Siragusa's such interest. The funds due under the sale agreement were not fully turned over to the Trustee, but rather were substantially prepaid immediately before the Bankruptcy Petition.

Closing: The purported violations of Siragusa's partnership agreements was contrived and staged. The Medical Practice was at no time suffering cash flow problems or in financial jeopardy, but rather was increasingly profitable and in no danger of collapse except to the extent of self imposed problems as part of the efforts to avoid Siragusa's obligations to Joanne.

In addition, Participants HIN, HICL and Bowers and Defendants Brown and Beckley prepared, signed and/or filed with the Bankruptcy Court three false and fraudulent proofs of claim on January 19, January 19,

and May 11, 1988 based on the "negative capital accounts" described in numbered paragraph 16 of the foregoing Addendum to Statement of Affairs pursuant to the nonexistent Siragusa Termination.

The following additional false and fraudulent documents were also prepared and/or utilized by Defendants Brown and Beckley and/or the various Participants to further the false and fraudulent Reorganization which the foregoing Addendum to Statement of Affairs purported to "explain". These documents were (i) provided to Joanne and the Trustee to discourage their efforts to enforce their respective rights as the Reorganization and Bankruptcy Case proceeded or (ii) produced in generally compelled discovery to Joanne and the Trustee in the Bankruptcy Case or the Adversary Proceeding, and included the following categories of items which were backdated and/or otherwise contained false and/or misleading information, including the reflection of events and agreements which did not actually occur or exist, all of which becomes apparent when the backdated and otherwise fraudulent documents are compared to legitimate or internal documents relating to the same matters:

1. Correspondence and memoranda by which Defendants Brown and Beckley and the various Participants (i) attempted to mislead Joanne and the Trustee or (ii) revealed their own improper such misconduct:

Item Description: Why Misleading
Brown's letter to Siragusa dated June 26, 1987: This letter falsely asserts that HIN, HICL and HIP were in poor financial condition, capital calls were necessary with

respect to those entities, and Siragusa was unable to meet his share of those calls. This letter was intended to be, and was, re-distributed to Joanne and the Trustee.

Letter from Siragusa's divorce counsel to Joanne's counsel dated June 29, 1987: This letter relayed the false HIN, HICL and HIP poor financial condition and Siragusa capital call information from Brown, Siragusa and the rest of the Participants and threatened Siragusa's bankruptcy.

Brown's letter to Joanne's counsel dated September 4, 1987: This letter provided false assurances regarding the then existing and contemplated future status of Siragusa in HIN, HICL and HIP while Joanne's divorce enforcement proceedings and settlement efforts were pending.

Item Description: Why Reveals Fraudulent Misconduct

Letter from Siragusa's divorce counsel to Siragusa dated September 15, 1987: This letter, which was written shortly after Siragusa lost the initial divorce enforcement proceeding and was produced in discovery years later, (i) admonishes Siragusa to "disclose the true partnership status soon", (ii) describes Brown's role in the Siragusa Terminations and Siragusa's bankruptcy, and (iii) cautions Siragusa that "there should be no false hope that delays will avoid the setting aside of your partnership transfers".

Letter from Bowers to Brown dated October 13, 1987: This letter, which was produced in discovery years later, describes various methods to "tie up the remaining assets of HIN for many years beyond when a judgment must be made concerning Vince's possible bankruptcy" and make

it "difficult or impossible for a bankruptcy referee to strip HIN of its assets in the face of a potential large liability", including transferring HIN's funds to CAN and filing an action by HIN against Siragusa.

Memorandum from Brown to Siragusa file, Bowers and bankruptcy counsel for Bowers and CAN dated February 25, 1988: This memo, which was produced in discovery years later, describes bankruptcy strategy, including "running circles" around Joanne's bankruptcy counsel.

Letter from Brown to Bowers dated February 29, 1988: This letter, which was produced in discovery years later, describes additional bankruptcy strategy matters, including (i) presenting hypothetical information designed to put the Trustee on her side and (ii) not to pay any more HIN receivables to the Trustee, but rather "establish a 'pot' against which to claim an offset for the amount of money that Vince [Siragusa] owes us".

Letter from Brown to Bowers accountant dated April 12, 1988: This letter, which was produced in discovery years later, which provided a revised "history" of Siragusa's relationships with HIN and CAN during 1987 and 1988 and requested a modified calculation of Siragusa's income allocations based thereon. This information is inconsistent with the information provided in Brown and Beckley's Addendum to Statement of Affairs and the actual agreements and payments of funds pursuant to the Reorganization.

Brown's various internal memoranda concerning the Siragusa Termination and HIN Dissolution, including those dated August 22, September 24, and November 11,

1987: These documents discuss prospectively events which had not yet taken place as of those dates and demonstrate actions, all inconsistent with the documents and information provided to Joanne and the Trustee.

2. The following additional documents relating to the Siragusa Termination and HIN Dissolution which were not included in the documents attached to the Addendum of Statement of Affairs but (i) by which Defendants Brown and Beckley and the various Participants otherwise attempted to mislead Joanne and the Trustee or (ii) which show the true contrary actual events:

Item Description:	Why False and Fraudulent

Siragusa HIN Termination Acknowledgment dated August 15, 1987: This document, by which Siragusa purported to "acknowledge" his non-existent HIN Termination on and as of August 15, 1987, was backdated to support the purported Termination.

Security Agreement by Siragusa to HIN dated September 10, 1987: This document, which purported to secure the negative capital account balance purportedly due under his non-existent HIN Termination, was backdated to support the purported Termination.

Agreement between HIN and CAN re miscellaneous items dated October 10, 1987: This document was backdated to support the purported HIN Dissolution and medical transfer to CAN for the purpose of diverting HIN's funds and other assets to CAN.

Amendment between HIN and CAN re miscellaneous items dated November 3, 1987: This document was backdated to support the purported HIN Dissolution and

medical transfer to CAN for the purpose of diverting HIN's funds and other assets to CAN.

Termination of Joint Venture Agreement dated June 14, 1988: This document was created to support the purported Siragusa HIN Termination and further the fraudulent Reorganization by implementing the HIN Liquidating Trust to hold HIN assets properly belonging to the Trustee.

Siragusa HICL Termination Acknowledgment dated August 27, 1987: This document, by which Siragusa purported to "acknowledge" his HICL Termination on and as of August 27, 1987, was backdated to support his purported Termination.

Various HIP Right of First Refusal documents dated throughout September 1987: These documents, by which Siragusa purported to give notice to his HIP partners of his intention to sell his HIP interest, were backdated and inconsistent with the HIP sale documents presented to the Trustee.

Brown's letter to Bowers dated October 12, 1987 and its various Siragusa HIP interest sale enclosures: These documents, reflect yet another transaction by Siragusa to dispose of his HIP interest which is inconsistent with the HIP sale documents presented to the Trustee.

3. The following additional HIN minutes and resolutions relating to the Siragusa Termination and the HIN Dissolution which were not included in the documents attached to the Addendum of Statement of Affairs but (i) by which Defendants Brown and Beckley and the

various Participants otherwise attempted to mislead Joanne and the Trustee or (ii) which show the true contrary actual events:

Item Description: Why False and Fraudulent
HIN minutes dated June 23, July 20, and August 10, 1987: These documents reflect that no Siragusa Termination matters actually took place during these months.
HIN minutes dated August 28, 1987: This document was backdated to support the purported Siragusa Termination.
Five sets of HIN minutes dated September 21, 1987: These minutes were backdated to support the purported Siragusa Termination and the purported HIN Dissolution and medical transfer to CAN for the purpose of diverting HIN's funds and other assets to CAN.
HIN resolution dated October 8, 1987: This document was backdated to support the purported Siragusa Termination and the purported HIN Dissolution and medical transfer to CAN for the purpose of diverting HIN's funds and other assets to CAN.
HIN minutes dated December 29, 1987: This document was backdated to support the purported Siragusa Termination and the purported HIN Dissolution and medical transfer to CAN for the purpose of diverting HIN's funds and other assets to CAN.
HIN resolution undated re Pretto Contract: This document was prepared to support the purported HIN Dissolution and medical transfer to CAN for the purpose of diverting HIN's funds and other assets to CAN.

4. The following additional CAN resolutions and minutes relating to the Siragusa Termination and the HIN Dissolution which were not included in the documents attached to the Addendum of Statement of Affairs but (i) by which Defendants Brown and Beckley and the various Participants otherwise attempted to mislead Joanne and the Trustee or (ii) which show the true contrary actual events:

Item Description: Why False and Fraudulent
Two sets of CAN resolutions dated September 21, 1987: These resolutions were backdated to support the purported Siragusa Termination and the purported HIN Dissolution and medical transfer to CAN for the purpose of diverting HIN's funds and other assets to CAN.
Four sets of CAN resolutions dated September 29 and October 3, 1987: These resolutions reflect the strong financial condition of HIN and CAN notwithstanding the purported HIN Dissolution and contrary documents provided to Joanne and the Trustee and were backdated to support the purported Siragusa Termination and the purported HIN Dissolution and medical transfer to CAN for the purpose of diverting HIN's funds and other assets to CAN.
CAN resolution dated October 8, 1987: This resolution were backdated to support the purported HIN Dissolution and medical transfer to CAN for the purpose of diverting HIN's funds and other assets to CAN.
Resolution dated October 10, 1987: This document was backdated to support the purported HIN Dissolution

and medical transfer to CAN for the purpose of diverting HIN's funds and other assets to CAN.

CAN resolution dated October 15, 1987: This resolution reflects the strong financial condition of HIN and CAN notwithstanding the purported HIN Dissolution and contrary documents provided to Joanne and the Trustee.

CAN resolution dated November 9, 1987: This resolution was backdated to transfer Siragusa's "employment" agreement with CAN (which was admittedly equal to his prior profit sharing arrangements) from Siragusa Ltd to Siragusa individually as of the filing of his Bankruptcy Petition and thereafter to Siragusa Chtd, inconsistent with what he had informed the Trustee was the case.

CAN minutes dated November 23 and 30, and December 2, 8, 9, 21, and 31, 1987: These minutes were backdated and altered to reflect Heeren's addition as a CAN director to support the purported HIN Dissolution and medical transfer to CAN.

5. **The following additional documents relating to Siragusa's purported employment arrangements** with HIN and CAN after his purported Termination and the purported HIN Dissolution which were not included in the documents attached to the Addendum of Statement of Affairs but (i) by which Defendants Brown and Beckley and the various Participants otherwise attempted to mislead Joanne and the Trustee, (ii) which are inconsistent with the employment documents and information in the Addendum to Statement of Affairs, and (iii) which are contrary to the true actual events:

Item Description: Why False and Fraudulent

An additional employment agreement between Siragusa Ltd and HIN dated August 28, 1987: This document was backdated and not given actual effect by the parties.

Additional employment agreements between Siragusa Ltd and CAN dated August 28 and September 22, 1987: These documents were backdated and not given actual effect by the parties.

An additional employment agreement between Siragusa Chtd and CAN dated September 22, 1987: This document was backdated and not given actual effect by the parties.

An agreement between Siragusa and CAN relating to his purported employment agreement dated March 1, 1988: This document is inconsistent with the documents and information given to the Trustee.

The various additional employment agreements between HIN and CAN and other physicians, such as various documents between HIN and CAN and John Pretto all dated October 1, 1987: These documents were backdated to support the purported HIN Dissolution and medical transfer to CAN for the purpose of diverting HIN's funds and other assets to CAN and are inconsistent.

See also the December 28, 1990 Affidavit Re Reorganization and related consistent testimony provided by Paul Heeren and Carol Heeren in their depositions on October 15 and 16, 1991 and March 30, 1992 which

candidly describe the false and fraudulent Reorganization from their insider participant perspective, including as follows with respect to the false and fraudulent materials contained in the Addendum to Statement of Affairs prepared and submitted by Defendants Brown and Beckley:

> 8. The Reorganization information which Mrs. Brown presented to the trustee in the Brown Trustee Memo was a sham and a farce inasmuch as neither Dr. Bowers nor I ever agreed to actually terminate our interests in the Partnerships. To the contrary, the terminations and other changes in the relationships of the partners resulting from the Reorganization were designed and intended to be mere "paper transactions" for the express purpose of protecting the Partnerships from harm by Joanne Siragusa's divorce claims against Dr. Siragusa. It was expressly discussed, understood and agreed among Dr. Bowers, Dr. Siragusa, Mrs. Brown and me that notwithstanding the Reorganization documents (some of which were backdated) (i) all of the preexisting ownership interests of Dr. Bowers and me in the Partnerships would be fully and completely restored once Ms. Siragusa's divorce claims had been resolved, (ii) all of the preexisting ownership interests of Dr. Siragusa would also be fully and completely restored as soon as "legally possible", and (iii) the pre-existing division of Partnership profits during the interim would be maintained by various employment contracts (collectively the "Side Agreements").

In addition to the creation and use of these various false and fraudulent documents, Defendants Brown and Beckley and the various Participants destroyed or otherwise concealed from Joanne and the Trustee various documents which actually existed and whose contents would have further revealed the false and fraudulent nature of the Reorganization and the rest of the Conspiracy. Such destruction and other withholding (i) constitutes additional specific instances of fraud upon Joanne and the Bankruptcy Estate and (ii) is more particularly described in Exhibit "4" as part of the Obstruction of Justice described therein.

As a result of this fraud upon and concealment from the Bankruptcy Estate and its Trustee, substantial amounts of assets were diverted by Defendants Brown and Beckley and the Various participants from the Bankruptcy Estate and its Trustee. In addition to the diverted Siragusa Medical Practice Interests themselves, the assets so diverted by Defendants Brown and Beckley and the various Participants included Siragusa's share of the profits and other distributions from the Medical Practice Enterprise, which included without limitation Siragusa's interest in at least the following items to which Bowers, CAN, Siragusa, Siragusa Chtd and the HIN Liquidating Trust were not entitled:

1. Payments to John A. Bowers and/or CAN:

PERIOD	DESCRIPTION	AMOUNT($)
1987	CAN Compensation	455,000
1987	HIN Distributions	416,698
1987	HICL Distributions	22,126
1987	HIP Distributions	20,663
1987	CAN Credits Against HIN	575,094

1988	CAN Compensation	414,300
1988	HIN Distributions	56,583
1988	HICL Distributions	16,483
1988	HIP Distributions	22,729
1989	CAN Compensation	544,036
1989	HICL Distributions	191,087
1989	HIP Distributions	61,989
1990	CAN Compensation	421,058
1990	HICL Distributions	430,324
1990	HIP Distributions	29,127
1990	CAN Stock Sales	581,250
1991	CAN Compensation	Unknown
1991	CAN Stock Sales	228,750
1992	CAN Compensation	Unknown
1993	CAN Compensation	Unknown

2. Payments to Siragusa and/or Siragusa Ltd:

PERIOD	DESCRIPTION	AMOUNT($)
1987	Siragusa Ltd Compensation	201,100
1987	HIN Distributions	370,633
1987	HICL Distributions	34,326
1987	HIP Distributions	20,663
1987	HIP Sale Payments	30,000
1988	Siragusa Chtd Compensation	295,000
1988	Siragusa MD Income	71,355
1989	Siragusa Chtd Compensation	498,800
1990	Siragusa Chtd Compensation	554,232
1991	CAN Compensation	331,768
1991	Siragusa Chtd Compensation	Unknown
1992	CAN Compensation	469,433
1992	Business Income	Unknown
1993	Business Income	Unknown

3. Payments to HIN Liquidating Trust:

PERIOD	DESCRIPTION	AMOUNT($)
1988	HIN Medical Fee Collections	42,092.76
1989	HIN Medical Fee Collections	16,303.65
1990	HIN Medical Fee Collections	2,259.35
1990	HIN Legal Fee Reimbursements	35,306.61
1991	HIN Medical/Legal Fees	Unknown
1992	HIN Medical/Legal Fees	Unknown
1993	HIN Medical/Legal Fees	Unknown

In addition, this fraud upon and concealment from the Bankruptcy Estate and its Trustee by Defendants Brown and Beckley and the various Participants utilized the mail, thereby also constituting mail fraud (upon Joanne as well as the Bankruptcy Estate and its Trustee) as described in Exhibit "2".

In addition, this fraud upon and concealment from the Bankruptcy Estate and its Trustee by Defendants Brown and Beckley and the various Participants utilized wire communications in interstate or foreign commerce, thereby also constituting wire fraud (upon Joanne as well as the Bankruptcy Estate and its Trustee) as described in Exhibit "3".

Further, the false and backdated documents utilized as part of this fraud upon and concealment from the Bankruptcy Estate and its Trustee (and Joanne) by Defendants Brown and Beckley and the various Participants **are part of the Obstruction of Justice as described in Exhibit "4".**

Still further, this fraud upon and concealment from the Bankruptcy Estate and its Trustee (and Joanne) by

Defendants Brown and Beckley and the various Participants, and the obstruction of justice by Defendants Brown and Beckley and the various Participants, **were utilized in connection with and to further the securities fraud relating to the Fraud Upon the Junior CAN Owners and the Fraud Upon Heeren described in Exhibit "5".**

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Exhibit "2"

NON-EXCLUSIVE LISTING OF SPECIFIC ACTS CONSTITUTING MAIL FRAUD IN VIOLATION OF 18 USC 1341

The fraud upon and concealment from the Bankruptcy Estate and its Trustee (and Joanne) by Defendants Brown and Beckley and the various Participants described in Exhibit "1", the Obstruction of Justice described in Exhibit "4", and the securities fraud described in Exhibit "5" utilized the mail for the purpose of executing their various fraudulent Schemes at least as follows:

1. Siragusa's false and fraudulent Bankruptcy Petition resulted in the creation of a "mailing matrix" of various persons, including Joanne, the Trustee, and the Other Creditors. Throughout the Bankruptcy Case from its filing in November 1987 to this time, Siragusa and others, including the Bankruptcy Court Clerk on Siragusa's behalf, have made numerous mailings of materials as reflected by the Bankruptcy Court files relating to

the Bankruptcy Case intended by Defendants Brown and Beckley and the various Participants to further the false and fraudulent Bankruptcy Petition.

2. The Addendum to Statement of Affairs prepared by Defendants Brown and Beckley was mailed to counsel for Joanne and the Trustee around December 1987.

3. Various discovery responses containing false and fraudulent information based on (i) the Addendum to Statement of Affairs prepared by Defendants Brown and Beckley and (ii) the additional false and fraudulent documents described in Exhibit "1" were mailed to counsel for Joanne and the Trustee since the Bankruptcy Case and the Adversary Proceeding were commenced, including without limitation the following:

Date: Description

January 15, 1992: Defendants, Patricia L. Brown and Patricia L. Brown Ltd., answers to Joanne's first set of interrogatories

January 22, 1992: Defendants, Patricia L. Brown and Patricia L. Brown Ltd., supplemental answer to Joanne's, first set of interrogatories

January 22, 1992: Defendants, Patricia L. Brown and Patricia L. Brown Ltd., supplemental response to Joanne's first request for production of documents

January 31, 1992: Vincent Siragusa's response to Joanne's second set of requests for production of documents

February 18, 1992: Responses of Beckley, Singleton, Delanoy, Jemison & List, Chtd., to Joanne's first request for production of documents (No. 1)

February 19, 1992: Responses of Beckley, Singleton, Delanoy, Jemison & List, Chtd., to Joanne's first interrogatories (Nos. 1-18, inclusive)

March 4, 1992: Response of Beckley, Singleton, Delanoy, Jemison & List, Chtd., to Joanne's second set of interrogatories (Nos. 1-6, inclusive)

March 4, 1992: Responses of Beckley, Singleton, Delanoy, Jemison & List, Chtd., to Joanne's second set of requests for production of documents.

March 19, 1992: Supplement to Patricia L. Brown's and Patricia L. Brown, Ltd.'s answers to Joanne's first set of interrogatories pursuant to a court order dated February 19, 1992

May 12, 1992: Responses of Beckley, Singleton, Delanoy, Jemison & List, Chtd., to Joanne's expert interrogatories (Nos. 1-4, inclusive)

August 31, 1992: Supplemental response of Beckley, Singleton, Delanoy, Jemison & List, Chtd. to Joanne's first set of interrogatories (Nos. 1-18, inclusive) and request to produce

4. Many of the additional false and fraudulent documents described in Exhibit "1", including especially but without limitation the correspondence contained therein, were mailed as indicated thereon and additionally (i) to counsel for Joanne and the Trustee and (ii) among Defendants Brown and Beckley and the various Participants.

5. In addition to the false and fraudulent correspondence listed in Exhibit "1", Defendants Brown and Beckley and the various Participants mailed various others letters among themselves and to counsel for Joanne and

the Trustee to conceal and otherwise further their fraudulent schemes, including without limitation the following:

Date: Description

June 29, 1987: Brown letter to Siragusa re incorporation of Siragusa Ltd.

August 28, 1987: Brown letter to Joanne's counsel re Siragusa settlement.

September 2, 1987: Bowers letter to Brown re Siragusa Termination.

September 3, 1987: Bowers letter to Brown re Siragusa Termination and Valley Bank refinancing.

September 22, 1987: Bowers letter to Security Bank re Siragusa Termination.

September 24, 1987: Bowers letter to Valley Bank re Siragusa Termination and refinancing.

March 3, 1988: Brown letter to Siragusa re incorporation of Siragusa Chtd.

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Exhibit "3"

NON-EXCLUSIVE LISTING OF SPECIFIC ACTS CONSTITUTING WIRE FRAUD IN VIOLATION OF 18 USC 1343

The fraud upon and concealment from the Bankruptcy Estate and its Trustee (and Joanne) by Defendants Brown and Beckley and the various Participants

described in Exhibit "1", the Obstruction of Justice described in Exhibit "4", and the securities fraud described in Exhibit "5" utilized wire communications in interstate or foreign commerce for the purpose of executing their various fraudulent Schemes at least as follows:

1. Various telephone discussions between Brown in Las Vegas, Nevada and the various Participants in other states and foreign countries during 1987 to plan and implement the purported Siragusa Termination and the HIN Dissolution, including without limitation phone discussions by Brown in Las Vegas (i) in September 1987 with Bowers while he was in Hong Kong and (ii) at various time in 1987 and 1988 with Bowers while he was in the HIN/CAN medical practice office in Bullhead City, Arizona.

2. Various telephone discussions between Brown and CAN staff members in Las Vegas, Nevada with third party insurance carriers and medical certification groups in other states from September to December 1987 to implement the purported Siragusa Termination and HIN Dissolution.

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Exhibit "4"

NON-EXCLUSIVE LISTING OF SPECIFIC ACTS CONSTITUTING (I) OBSTRUCTION OF JUSTICE IN VIOLATION OF 18 USC 1341, (II) PERJURY OR SUBORNATION OF PERJURY IN VIOLATION OF N.R.S. 207.360(27) AND 199.200, AND (III) OFFERING FALSE EVIDENCE IN VIOLATION OF N.R.S. 207.360(28) AND 199.210

In addition to the false and fraudulent Bankruptcy Petition, Defendants Brown and Beckley's Addendum to Statement of Affairs, HIN and HICL's false Proofs of Claims, and the other False Information filed or otherwise provided in the Bankruptcy Case and the Adversary Proceeding as described in Exhibit "1", Defendants Brown and Beckley and the various Participants committed numerous acts of perjury, subornation of perjury, fabrication of false documents, and destruction of documents, especially when the Bankruptcy Petition and the Addendum to Statement of Affairs and the other False Information were challenged by Joanne and the Trustee, at least as follows:

1. Defendants Brown and Beckley and the various Participants destroyed and otherwise concealed documents, even after court orders (i) generally instructing the parties to proceed with depositions and document production and (ii) specifically compelling testimony and production by the Defendants and Participants on June 24 and September 15 and 19, 1988, June 7, July 7 and November 13, 1990, June 14, 1991, and February 20, March 6, April 14, and May 22, 1992:

MISSING ITEM DESCRIPTION

The "alternative #1 of the outline to activate" which is specifically mentioned in Brown's memo dated September 24, 1987 memo.

Brown's June 25, 1987 letter regarding debtor which is specifically mentioned in Dr. Bowers September 2, 1987 letter to Brown.

The following letters and other documents concerning the following relevant subjects which are specifically mentioned in Brown's attached billings on the dates set forth:

April 18, 1987: Brown's notification requirements for assignment of the partnership interest in Heart Institute.

May 25, 1987: Brown's completion of partnership and summary.

May 30, 1987: Brown's letter to John Bowers regarding retirement plan assets.

August 22 through August 25, 1987: Brown's research on Vince Siragusa's "issues", including partnership terms and bankruptcy.

August 27, 1987: Brown's letter to client with attachments.

August 27, 1987: Brown's letter re partnership termination.

September 1, 1987: Brown's preparation of termination documents.

September 14, 1987: Brown's letters to client re Joanne's counsel.

September 14, 1987: Brown's letters to client re letters received from Joanne's counsel.

September 29 through October 9, 1987: Brown's "commencement" and completion of work on corporate and partnership change over, shifting and related issues and corporate transition documents.

November 9, 1987: Brown's recording of documents.

November 12, 1987: Brown's tying up of "loose ends" regarding the HIC leases.

November 20, 1987: Brown's amending of articles of incorporation.

December 12, 1987: Brown's "Time Line of Issues Re hear Inst & Vince Siragusa"

December 27, 1987: Brown's letter regarding malpractice insurance concerns and options.

February 5, 1988: Brown's letter to Ms. Armstrong regarding information requested on "Vince's" bankruptcy.

February ?, 1988: The illegible entry which refers to Mr. Shinehouse and preparation of a memo re the hearing.

March 20, 1988: Brown's letters regarding review of employment contracts, information for Mr. Shinehouse, and amendments to proofs of claim.

April 16, 1989: Brown's memo to file re option desired for Heeren settlement.

April 29, 1989: Brown's letter re meeting discussions with "Paul and his attorney". (Note: This item is specifically mentioned in Brown's attached November 4, 1989 billing to John Bowers, MD.)

May 5, 1989: Brown's corporate dissolution research and documents.

May 6, 1989: Brown's documentation re litigation and new organization.

May 30, 1989: Brown's documents for Paul Heeren.

July 3, 1989: Brown's research and memo for limitations of fraud.

July 15, 1989: Brown's letter re fraud statute of limitations.

October 7, 1989: Brown's memo to file re documentation needed for Cath Lab and Heart Institute.

November 9, 1989: Brown's release of liability form for Dr. Heeren.

November 28, 1989: Brown's letter and indemnification of Paul Heeren.

March 29, 1990: Brown's letter contracts for sale of practice. The numerous drafts of the various corporate "Reorganization" documents and many revisions thereto which are specifically mentioned throughout Brown's attached billings between July 15, 1989 and May 14, 1990, including especially those made before the "call re: modifications to contracts to eliminate Siragusa" set forth on

March 6, 1990 in the May 29, 1990 billing to John A. Bowers, MD, Ltd.

Brown's notes from the numerous telephone calls and conferences specifically mentioned in her various attached billings.

2. Providing false and fraudulent deposition testimony, and encouraging others to do so, even after court orders (i) generally instructing the parties to proceed with depositions and document production and (ii) specifically compelling testimony and production by the Defendants and Participants on June 24 and September 15 and 19, 1988, June 7, July 7 and November 13, 1990, June 14, 1991, and February 20, March 6, April 14, and May 22, 1992:

A. The following persons have been deposed by Joanne and the Trustee in the Adversary Proceeding between 1990 and 1993: Defendant Brown and other attorneys and agents of Defendant Beckley, including without limitation attorney Lary Lamoreaux; Bowers, Siragusa and the various other individual Participants, including without limitation Heeren (and his wife, Carol Heeren); and various agents of the entity Participants, including without limitation their accountant Gary Mathis.

B. This deposition testimony has revealed numerous examples of:

(1) Perjury, which is evident by comparing:

(a) The testimony of one such deponent at one time with the testimony of that same deponent at another time about the same matters. See, for example:

Brown's inconsistent testimony about whether or not Siragusa was actually Terminated from HIN; the vacillating testimony of Brown and Bowers about the June 25, 1987 events when Joanne's Marital Lien was purportedly discovered, the HIN partnership agreement was purportedly amended and Siragusa was purportedly given notice of his defaults; and Brown's vacillating testimony about whether any documents relating to the Reorganization were backdated, all as described in more detail below.

(b) The testimony of one such deponent with the testimony of another such deponent about the same matters. See, for example, the conflicting testimony among (i) Heeren and his wife, Brown, Bowers and Lary Lamoreaux about whether any documents relating to the Reorganization were backdated, (ii) Siragusa, Brown and Bowers about the purported June 1987 discovery of Joanne's Lien, and (iii) the existence and effect of the Siragusa Termination, all as described in more detail below.

(c) The testimony of one such deponent with (i) information contained in the Bankruptcy Petition and related Statements and Schedules, including Brown's Addendum to Statement of Affairs, and other documents filed in the Bankruptcy Case and/or (ii) the correspondence and other documents produced by that deponent or other such deponents in the Adversary Proceeding. See, for example, the inconsistent testimony about (i) the Siragusa Termination, (ii) Brown's divorce work for Siragusa, and (iii) Brown's work in connection with the Siragusa Bankruptcy and other bankruptcies.

(2) Subornation of perjury, which is evident by comparing the manner in which the false testimony of groups of the deponents have fluctuated in concert on certain issues over the course of the Adversary Proceeding: For example, the concurrent changes in testimony of multiple deponents regarding the critical June 25, 1987 events and the purported nonexistence of the HIN medical practice demonstrate collusion in the defense testimony.

C. While a number of the deponents have committed perjury, the following non-exclusive additional illustrations will focus primarily on Defendant Brown who is (i) the most blatant perjurer, (ii) the person with the key role in planning and implementing the Reorganization and Conspiracy as shown by Bowers testimony, Heeren's testimony and Brown's own correspondence and other documents, and (iii) still committing perjury in her as yet incomplete deposition testimony as recently as October 20, 1993:

PERJURED TESTIMONY TOPICS
AND DEPOSITION REFERENCES

(References Are To Date Of Brown Deposition And Page Of Brown Deposition Transcript Volume Given Where Subject Testimony Begins)

Discovery of Joanne's Marital Liens, HIN Partnership Amendment and Siragusa Default: Brown has testified that on June 25, 1987 she purportedly (i) discovered the existence of Joanne's Marital Liens and (ii) worked with Bowers, Siragusa and Heeren to amend the HIN partnership agreement to facilitate Siragusa's Termination and

give Siragusa notice of his default thereunder. See, for example Brown's November 14, 1990 at page 220, November 28, 1990 at pages 64 and 636, April 9, 1992 at pages 16 and 36; May 1, 1992 at page 352; September 14, 1992 at pages 434, 602 and 605; and September 22, 1993 at page 778. Brown has also testified in her 1990, 1992 and 1993 deposition sessions that the information provided to the Trustee in her Addendum to Statement of Affairs was, and still is, true and correct. See, for example Brown's November 14, 1990 beginning at pages 170, 211, and 215; November 27, 1990 at page 437; November 28, 1990 at page 542; April 9, 1992 at page 163; September 14, 1992 at pages 535, 590 and 625; September 22, 1993 at page 703, 780 and 785; and October 20, 1993 at page 947.

However, this testimony and the Addendum are inconsistent between themselves as to various matters. Further, this testimony and information are inconsistent with other documents and information obtained in discovery as to various matters. Still further, this testimony and the Addendum are inconsistent with the testimony of Siragusa, Heeren and Carol Heeren as to various matters. In fact, Brown's own later testimony has recognized that Heeren was out of town on June 25, 1987 and therefore could not have executed or authorized any documents at that time as he did not even meet with her until his return in July. See, for example, Brown's April 9, 1992 at page 53; May 1, 1992 at page 324; and September 22, 1993 at page 787.

Siragusa HIN Termination: Brown has testified that Siragusa was not actually Terminated from HIN and his purported HIN Termination was not to be given any effect. See, for example, Brown's November 27, 1990 at

page 498; November 28, 1990 at page 653; April 9, 1992 at pages 74, 120 and 155; May 1, 1990 at pages 269, 276, 389 and 400; September 15, 1992 at pages 440, 444, 452 and 468; September 22, 1993 at pages 794 and 814; October 13, 1993 at page 955; and October 20, 1993 at page 924. Brown has also testified in her 1990, 1992 and 1993 deposition sessions that the information provided to the Trustee in her Addendum to Statement of Affairs was, and still is, true and correct. See, for example the Brown deposition references to this correctness in the immediately preceding deposition topic.

However, the information contained in her Addendum to Statement of Affairs included repeated assertions and supporting documents that the Siragusa HIN Termination had in fact taken place and been given effect as described in detail in Exhibit "1". Further, Bowers and Siragusa have testified that Siragusa was in fact Terminated from HIN as described in the Addendum to Statement of Affairs.

False Proofs of Claims: Brown testified in her September 22, 1993 deposition at page 803 and her October 13, 1993 deposition at page 957 that she did not prepare any of the three proofs of claims filed in Siragusa's Bankruptcy Case on behalf of HIN and HICL in connection with the negative capital accounts arising from Siragusa's purported Termination. This testimony is contradicted by the face of those documents and Brown's own billing records and correspondence for the periods around the dates of those claims as well as her own prior 1990 deposition testimony. See, for example, Brown's November 14, 1990 at page 260 and November 27, 1990 at page 305.

Brown's Involvement, Legal Representation, and Advice in the Reorganization: The scope and extent of Brown's personal involvement and legal representation and advice in connection with the Reorganization has steadily declined from the submission of her Addendum of Statement of Affairs to the Trustee in 1987 and her initial deposition testimony in 1990 through her most recent deposition testimony in 1993.

Brown began by personally representing to the Trustee the "bona fides" of the Reorganization based on her personal involvement as is evident by the "we did" wording in her December 14, 1987 letter to the Trustee filed as part of her Addendum to Statement of Affairs and her statements to the Trustee as to what he was told by her. The Trustee has also testified that Brown told him at that time that she could personally vouch for what had in fact occurred. In her 1990 deposition, Brown confirmed her representation of each and all of the Participants in the Reorganization and her role in structuring and implementing that transaction. See, for example, Brown's November 14, 1990 at pages 76, 86, 175 and 192; November 27, 1990 at pages 304, 328, 345, 398, 425, 465, 471, 473 and 475; and November 28, 1990 at pages 523 and 587.

Even though Brown's legal representation and detailed personal involvement in connection with the Reorganization are confirmed by Heeren and his wife, Brown's associate Lary Lamoreaux, Bowers and Brown's own correspondence and other documents, Brown has increasingly distanced herself from the Reorganization since she was made a named defendant in the Adversary Proceeding in 1991. By the time of her 1992 deposition, Brown had substantially reduced her own involvement to

someone who merely answered hypothetical questions for Bowers and the other "guys" who did their own documents and made their own decisions based on her limited advice. See, for example, Brown's April 9, 1990 at pages 61, 73, 101, 109, 119, 121, 127 and 131, May 1, 1992 at pages 245 and 266; September 14, 1992 at pages 445, 498, 529, 554, 561, 614 and 622. By the time of her 1993 deposition, Brown testified that (i) she had represented only HIN and CAN to whom she now claimed to have rendered virtually no legal advice regarding the Reorganization, and (ii) Lamoreaux, other unspecified persons in her "office" and the "guys" had made and prepared virtually all of the decisions and documents for the Reorganization. See, for example, Brown's September 22, 1993 at page 706, 712, 716, 718, 722, 726, 729, 731, 752, 758 and 779; October 13, 1993 at pages 948 and 960; and October 20, 1993 at pages 859, 864 and 866.

Backdating of Documents in Reorganization: Part of the vouching which Brown did for the Reorganization described in her Addendum to Statement of Affairs was that the documents attached to and otherwise described therein were valid documents and not fraudulently backdated. Brown testified in 1990 that she definitely did not participate in, and was not aware of, backdating any Reorganization documents. See, for example Brown's November 28, 1990 at page 523. Brown also testified in 1990 that she was not personally aware when certain of the Reorganization documents were executed, including specifically the June 25, 1987 HIN partnership amendment. See, for example, Brown's November 28, 1990 at page 564. Brown later testified that she did not tell the Trustee that any of the documents in her Addendum were

backdated. See, for example, Brown's September 14, 1992 at page 536. Brown has further testified that the Trustee was justified in relying on her Addendum presentation. See, for example, October 20, 1993 at page 947.

However, when it was later discovered, among other things, that (i) Heeren was out of town on June 25, 1987 and therefore could not have attended the meeting on that date when certain key documents were purportedly authorized and executed and (ii) Siragusa had admittedly disclosed the existence of the Marital Liens at least several weeks before June 25th, the testimony of Brown and her clients began to admit that these documents were not in fact executed on June 25, 1987. Further, the testimony of Heeren and his wife Carol Heeren is that Brown expressly advised Bowers, Siragusa and them that Reorganization documents would have to be backdated to coordinate Siragusa's Bankruptcy with his Termination. Still further, Brown's own associate attorney, Lary Lamoreaux, testified that Brown had backdated documents in connection with the Reorganization. Still further, Brown's own correspondence and other documents reveal that major portions of the Reorganization work was being addressed, documented and billed for well after the execution dates on the Reorganization documents contained in her Addendum to Statement of Affairs and the other Reorganization documents which Brown and the participants subsequently provided to Joanne and the Trustee.

In the face of this, Brown has changed her deposition testimony to admit that many Reorganization documents were executed after the dates on their face, including the June 25, 1987 HIN partnership amendment which Brown

admitted was executed by Heeren in Brown's office in July. In fact, Brown has now taken the position that it was Lary Lamoreaux who prepared many of the Reorganization documents after the dates reflected on their faces. See, for example, Brown's April 9, 1992 at page 136; May 1, 1992 at pages 309, 322 and 324; September 14, 1992 at pages 483, 506 and 554; September 22, 1993 at pages 760 and 811; October 20, 1993 at pages 860, 862, 866, 904 and 905.

Brown Involvement in Siragusa Bankruptcy: Brown has testified that she was not involved in planning for or implementing Siragusa's Bankruptcy. See, for example, Brown's November 14, 1990 at pages 9, 60 and 258; November 27, 1990 at pages 305 and 392; April 9, 1990 at pages 138 and 159; and September 14, 1992 at pages 543 and 561. In fact, Brown even testified that she did not know about Siragusa's bankruptcy filing until after it was done. See, for example, Brown's September 22, 1993 at pages 746 and 773 and October 20, 1993 at page 905. Brown has further testified that she did not do bankruptcy or commercial law work and told Bowers to engage other counsel who did. See, for example, Brown's September 14, 1992 at pages 466, 566 and 617; and September 22, 1993 at pages 709, 732 and 735.

However, Brown's testimony is inconsistent with her own contrary testimony describing her extensive work in contemplation of Siragusa's Bankruptcy. See, for example, April 9, 1990 at pages 59, 73, 119 and 131; May 1, 1992 at pages 266, 268, 270, 273, 366, 371, 373 and 396; September 14, 1992 at pages 437, 441, 446, 492, 499, 540, 545 and 561; September 22, 1993 at pages 704, 706 and 736; and October 20, 1993 at page 945. It is also inconsistent with her

own. correspondence and other documents which reveal that she was involved in developing Siragusa's Bankruptcy as an integral part of the Reorganization and implementing that Bankruptcy before and after submission of her false and fraudulent Addendum to Statement of Affairs. Further, Heeren and his wife have testified that Brown suggested and implemented Siragusa's Bankruptcy as part of her overall Reorganization scheme. Still further, Bowers has testified that Brown was engaged to advise him, CAN, HIN, HIP and HICL on these matters. Even Brown has recently admitted that she has in fact previously done bankruptcy work for a number of trustees, including Tom Grimmett. See, for example, Brown's September 22, 1993 at page 736.

Brown Knowledge of Bankruptcy Projection Schedule: Brown has testified that she does not know anything about the financial schedule entitled "Heart Institute of Nevada (Partnership) Projection of Bankruptcy Termination November 10, 1987" which shows "Dr. Siragusa's Share" of more than a million dollars of fees in HIN and CAN and the taxable portion thereof from the date of the purported Siragusa Termination through the date of filing his Bankruptcy Petition. See, for example, Brown's November 14, 1990 at page 262; September 14, 1992 at page 565; September 22, 1993 at page 775; and October 20, 1993 at page 941. HIN/CAN's accountant, Gary Mathis, similarly testified as to his own purported lack of knowledge of this financial schedule. However, Brown's own correspondence and other documents reveal her own personal involvement in this type of work with Mathis and others on behalf of the Participants. See also (i) Brown's April 9, 1990 testimony at page 86 that Mathis attended at

least one of the Reorganization meetings with her in August 1987 and (ii) her September 14, 1993 testimony at page 685 and October 20, 1993 testimony at page 937 that she worked on a Siragusa financial history and summary with Mathis and his staff accountant, David Dieterman. Further, Mathis' own staff accountant David Dieterman, has testified that he prepared this financial schedule at the instruction of Mathis and Brown.

Brown Involvement in Siragusa Divorce: Brown has testified in her 1990, 1992 and 1993 deposition sessions that she has not represented Siragusa regarding or been involved in his divorce matters with Joanne. See, for example: Brown's November 14, 1990 at pages 9, 15, 28, 57, 60 and 222; November 27, 1990 at pages 304 and 392; November 28, 1990 at page 640; April 9, 1992 at page 49; May 1, 1992 at pages 347, 349 and 359; and September 14, 1992 at pages 450 and 544. However, her own correspondence and other documents reveal that she has represented Siragusa and been frequently involved in those divorce matters from 1983 through 1987. Further, her own other testimony reveals frequent and ongoing contact with Siragusa's divorce counsel as well as false testimony about what he was telling her based on his correspondence with her. See, for example, April 1, 1992 at page 14, 46, 60 and 68; May 1, 1992 at pages 275, 278, 382 and 393; and September 14, 1992 at pages 416, 423, 430, 441, 449 and 461.

Brown Involvement in Fraud Upon Heeren: Brown has testified in her 1990 deposition sessions that she did not review with Heeren and his separate counsel documents to restore Heeren's medical practice interest or discuss with them the reasons why Heeren left upon discovering

that he would never receive his new replacement corporate ownership interest in the CAN Medical Practice. See, for example, Brown's November 27, 1990 at page 470, November 28, 1990 at page 665, and May 1, 1992 at page 243. However, her own correspondence and other documents reveals that she did so consistent with the testimony and statements by Heeren and his counsel.

Further, Brown has testified that before the HIN Dissolution, she fully discussed with Heeren that he would have no right to any ownership interest in the new CAN medical practice. See, for example, Brown's April 9, 1992 at page 129 and May 1, 1992 at page 263. In fact, she even testified that it was Heeren, not Bowers, who directed the HIN Dissolution. See, for example, Brown's September 22, 1993 at page 823. This is directly contrary to the testimony by Heeren and his wife as well as Brown's own inconsistent testimony that the use of the CAN medical practice was to be only temporary until Siragusa's situation was "resolved". See, for example, Brown's April 9, 1992 at pages 92 and 127; May 1, 1992 at pages 245 and 273; and September 14, 1992 at page 481.

Brown Involvement in Fraud Upon CAN Junior Owners: Brown testified in her October 13, 1993 deposition beginning at transcript page 874 that none of the CAN Junior Owners requested, and she did not provide, any estimate of the maximum Potential HIN/CAN Medical Practice Claims Recovery in connection with the CAN Stock Sales. At least two of the CAN Junior Owners have stated directly to the contrary to counsel for Joanne and the Trustee.

Existence of HIN Medical Practice: Brown's Addendum to Statement of Affairs described and repeatedly referred to the Heart Institute medical practice conducted by HIN in the explanatory letter to the Trustee and many of its various attached exhibits. Brown further testified in her November 1990 deposition session about this obviously existent medical practice and how it was moved out of HIN to CAN. See, for example, Brown's November 27, 1990 at page 501.

However, in her 1992 deposition testimony, she testified that HIN did not conduct a medical practice. See, for example, Brown's April 9, 1992 at pages 19 and 35. This false testimony denying the existence of HIN's medical practice was similarly presented by Bowers and various other deponents acting in concert for this new line of defense at various times in 1992.

3. Siragusa filing other false and fraudulent papers in the Divorce Proceedings:

Date:	Description
January 21, 1987:	Decree of Divorce modification pursuant to stipulation based on the false misrepresentation by Siragusa that downward modification was necessary because the Medical Practice was in financial difficulty.
August 17, 1987:	Siragusa's arrearages enforcement defense opposition based on the false misrepresentation that further downward modification was necessary to preserve Siragusa's Medical Practice Interest as the Medical Practice was in financial difficulty.
November 5, 1987:	Siragusa's request for temporary stay from entry of arrearages judgment for the falsely asserted

purpose of giving Siragusa time to post a bond for stay pending appeal to preserve Siragusa's Medical Practice Interest.

October 2, 1990: Siragusa's alimony modification defense based on Siragusa's purported Termination and additional false misrepresentations as to the financial condition of him and the Medical Practice.

Various dates between February 19, 1991 to August 30, 1991: Various additional alimony modification defenses based on Siragusa's purported Termination and false misrepresentations as to the financial condition of him and the Medical Practice.

In addition, the Obstruction of Justice by Defendants Brown and Beckley and the various Participants was part of the fraud upon and concealment from the Bankruptcy Estate and its Trustee (and Joanne) by Defendants Brown and Beckley and the various Participants as described in Exhibit "1".

In addition, the Obstruction of Justice by Defendants Brown and Beckley and the various Participants utilized the mail, thereby also constituting mail fraud (upon Joanne as well as the Bankruptcy Estate and its Trustee) as described in Exhibit "2".

In addition, the Obstruction of Justice by Defendants Brown and Beckley and the various Participants utilized wire communications in interstate or foreign commerce, thereby also constituting wire fraud (upon Joanne as well as the Bankruptcy Estate and its Trustee) as described in Exhibit "3".

Still further, the Obstruction of Justice by Defendants Brown and Beckley and the various Participants, and the fraud upon and concealment from the Bankruptcy Estate and its Trustee (and Joanne) by Defendants Brown and Beckley and the various Participants, **were utilized in connection with and to further the securities fraud relating to the Fraud Upon the Junior CAN Owners and the Fraud Upon Heeren described in Exhibit "5".**

GRIMMETT, ET AL V. BROWN, ET AL

Exhibit "5"

NON-EXCLUSIVE LISTING OF SPECIFIC ACTS CONSTITUTING (I) FRAUD IN THE SALE OF SECURITIES UNDER (A) SECTIONS 12(2), 15 AND 17 OF THE SECURITIES ACT OF 1933, AS AMENDED, (B) SECTIONS 10(B) AND 20 OF THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED, AND (C) SECURITIES AND EXCHANGE COMMISSION RULE 10-B5, 17 CFR 240.10B-5 (1991) AND (II) SECURITIES FRAUD IN VIOLATION OF N.R.S. 207.360(30) AND 90.750

The Fraud Upon Heeren by Defendants Brown and Beckley and Participants Bowers and CAN included the planning, documentation and implementation of the Reorganization and the rest of the Conspiracy described in Exhibit "1" and the complaint, and especially the HIN Dissolution, by which Defendants Brown and Beckley and Participants Bowers and CAN failed to honor their

False Heeren Representations to, among other things, (i) provide Heeren with his new replacement corporate ownership interest in the CAN Medical Practice or (ii) otherwise protect and maintain his HIN Medical Practice Interest.

This was done to induce Heeren to exchange his own HIN Medical Practice Interest for a new replacement corporate ownership interest in the CAN Medical Practice (the "Heeren Stock Sale"). However, Heeren never received his CAN Stock.

In doing so, Defendants Brown and Beckley and Participants Bowers and CAN not only failed to inform Heeren of the risks inherent in the HIN Dissolution the Heeren Stock Sale, and the rest of the Reorganization and Conspiracy, but affirmatively mispresented to him, among other things, that these steps (i) were necessary and appropriate to protect the HIN Medical Practice from harm by Joanne and the Trustee and (ii) would not result in any adverse economic or other consequences to his own HIN Medical Practice Interest.

Defendants Brown and Beckley and Participants Bowers and CAN used the means and instrumentalities of interstate commerce and the mails to further and accomplish the Heeren Stock Sale, including without limitation by (i) the mailings described in Exhibit "2" with respect to the Reorganization and the rest of the Conspiracy, (ii) the interstate telephone calls with respect thereto described in Exhibit "3", and (iii) the various additional telephone calls used in the planning and implementation of the Reorganization, including without limitation those telephone calls made by Defendants Brown and Beckley

to the Participants and others on the following dates for the purpose of furthering the Reorganization and defrauding Heeren as set forth more fully in Brown's billing and other records:

May 29, 1987
August 25, 1987
August 27, 1987
August 28, 1987
August 31, 1987
September 1, 1987
September 2, 1987
September 8, 1987
September 9, 1987
September 14, 1987
September 18, 1987
September 20, 1987
September 21, 1987
October 1, 1987
October 5, 1987
October 8, 1987
November 9, 1987
November 18, 1987
December 22, 1987
December 24, 1987
January 11, 1988
February 16, 1988
February 22, 1988
February 25, 1988
February 26, 1988
March 6, 1988
March 10, 1988
April 12, 1988
August 2, 1988
August 25, 1988
September 8, 1988
December 7, 1988

December 8, 1988
March 3, 1989
April 14, 1989
May 4, 1989
May 5, 1989
May 10, 1989
May 16, 1989
May 30, 1989
May 31, 1989
June 20, 1989
July 24, 1989
August 24, 1989
October 19, 1989
October 27, 1989

The Fraud Upon the CAN Junior Owners by Defendants Brown and Beckley and Participants Bowers and CAN included the negotiation and preparation of the documents for the subject CAN Stock Sale transactions (the CAN Stock Sale Documents) which failed to disclose to the CAN Junior owners, or provide them with reasonable protections to, the Potential HIN/CAN Medical Practice Claims Recovery which might result from the Adversary Proceeding which had previously been filed by Joanne individually and ex rel the Trustee, even though that Adversary Proceeding sought to avoid and unwind Siragusa's Termination and the HIN Dissolution. These CAN Stock Sale Documents included the following:

1. Stock Purchase Agreement dated April 9, 1990.

2. Buy-Sell Agreement dated April 9, 1990.

3. Practice Management Agreement dated April 9, 1990.

4. Employment Agreements related thereto of various dates.

5. Articles of Incorporation for Cardiology Associates of Nevada, Bowers, More, Thomas, Uhl, MD's, Ltd.

6. By-laws for Cardiology Associates of Nevada, Bowers, More, Thomas, Uhl, MD's, Ltd.

In addition, Defendants Brown and Beckley and Participants Bowers and CAN failed to otherwise inform the CAN Junior Owners of the Potential HIN/CAN Medical Practice Claims Recovery even though (i) Brown had admitted in her May 1, 1992 deposition testimony at transcript page 274 that due to Siragusa's Bankruptcy "the Heart Institute would not be in a secure position to start bringing in and selling interest to the other physicians until they really knew what they were selling" and (ii) the CAN Junior Owners had specifically inquired about such Potential Recovery.

To the contrary, Defendants Brown and Beckley and Participants Bowers and CAN used the Reorganization and the rest of the Conspiracy to induce the CAN Junior Owners (i) first to continue their employment with CAN and (ii) then to enter into the CAN Stock Sales, all notwithstanding the Adversary Proceeding which resulted in the Potential HIN/CAN Medical Practice Claims Recovery.

Further, Defendants Brown and Beckley and Participants Bowers and CAN affirmatively misrepresented to the CAN Junior Owners, among other things, that the maximum potential liability faced by CAN from the Adversary Proceeding was $250,000 at the meeting held

for execution of the CAN Stock Sale Documents on April 9, 1990.

Defendants Brown and Beckley and Participants Bowers and CAN used the means and instrumentalities of interstate commerce and the mails to further and accomplish the CAN Stock Sales, including without limitation by (i) the mailings described in Exhibit "2" with respect to the Reorganization and the rest of the Conspiracy, (ii) the interstate telephone calls with respect thereto described in Exhibit "3", (iii) the clearance of the purchase checks from the CAN Junior Owners through the national banking system, (iv) the various additional mailings and telephone calls used in the structuring, negotiation and documentation of the CAN Stock Sales and the CAN Stock Sale Documents, including without limitation:

1. Those telephone calls made by Defendants Brown and Beckley to Bowers, various CAN agents and others on the following dates for the purpose of preparing, executing and filing the CAN Stock Sale Documents as set forth more fully in Brown's billing and other records:

April 19, 1989
May 16, 1989
May 30, 1989
May 31, 1989
July 11, 1989
July 24, 1989
October 31, 1989
November 28, 1989
February 26, 1990
February 28, 1990
March 6, 1990
March 7, 1990
March 9, 1990

March 19, 1990
March 21, 1990
March 28, 1990
March 29, 1990
March 30, 1993
April 5, 1990
April 6, 1990
April 9, 1990
April 10, 1990
April 11, 1990
May 1, 1990

2. The various mailings of (i) the many drafts of the CAN Stock Sale Documents in their various versions prepared from 1989 to April 1990, (ii) the final CAN Stock Sale Documents, and (iii) the various sets of the purported conflict disclosure letters dated February 16, 1990 between Defendants Brown and Beckley and the CAN Junior Owners.

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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

In Re: VINCENT SIRAGUSA, Debtor.	)	BK-S-87-3085-LBR ADVERSARY PROCEEDING NO. 890068
JOANNE M. SIRAGUSA individually and ex rel TOM GRIMMETT, Trustee, Plaintiff, v. VINCENT SIRAGUSA, HEART INSTITUTE OF NEVADA (formerly CARDIOLOGY ASSOCIATES OF NEVADA), a Nevada partnership, HEART INSTITUTE PROPERTY, a Nevada partnership, HEART INSTITUTE CATH LAB, a Nevada partnership, VINCENT SIRAGUSA, M.D., LTD., a	)	

Nevada corporation, VINCENT SIRAGUSA, M.D., CHARTERED, a Nevada corporation, JOHN A. BOWERS, CARDIOLOGY ASSOCIATES OF NEVADA, JOHN A. BOWERS, M.D., LTD. (dba HEART INSTITUTE OF NEVADA), a Nevada corporation, PAUL HEEREN, and PAUL HEEREN, M.D., LTD., a Nevada Corporation and DOES 1 through 100, Defendants.	)

COMPLAINT TO (i) DETERMINE VALIDITY, PRIORITY AND EXTENT OF LIEN, (ii) SET ASIDE FRAUDULENT CONVEYANCE AND SUBSEQUENT TRANSFERS, (iii) DECLARE CONSTRUCTIVE TRUST, COMPEL RESTORATION AND ACCOUNTING, AND DETERMINE EXTENT OF PROPERTY OF ESTATE, (iv) DETERMINE DISSOLUTION AND APPOINT RECEIVER TO WIND UP, TERMINATE AND PREPARE ACCOUNTING FOR DISSOLVED PARTNERSHIP, (v) REVOCATION OF DISCHARGE, AND (vi) CONSPIRACY

Plaintiff claims and alleges against defendants as follows:

PARTIES

1. Plaintiff is a secured creditor of estate of the debtor with claims in excess of $1,500,000.

2. TOM GRIMMETT is the duly appointed and acting Trustee in debtor's Chapter 7 Bankruptcy Case.

3. Defendant VINCENT SIRAGUSA is the debtor in the Chapter 7 Bankruptcy Case.

4. Plaintiff is informed and believes and based thereon alleges that HEART INSTITUTE OF NEVADA ("HIN") (formerly CARDIOLOGY ASSOCIATES OF NEVADA) is a Nevada general partnership.

5. Plaintiff is informed and believes and based thereon alleges that HEART INSTITUTE PROPERTY ("HIP") is a Nevada general partnership.

6. Plaintiff is informed and believes and based thereon alleges that HEART INSTITUTE CATH LAB ("HICL") is a Nevada general partnership.

7. HIN, HIP and HICL are collectively referred to as the HEART INSTITUTE ENTITIES.

8. Plaintiff is informed and believes and based thereon alleges that VINCENT SIRAGUSA, M.D., LTD. and VINCENT SIRAGUSA, M.D., CHARTERED are each a Nevada corporation, the sole shareholder, officer and director of which is VINCENT SIRAGUSA, the debtor, who is their alter ego.

9. Plaintiff is informed and believes and based thereon alleges that JOHN A. BOWERS is an individual residing in the State of Nevada.

10. Plaintiff is informed and believes and based thereon alleges that CARDIOLOGY ASSOCIATES OF NEVADA, JOHN A. BOWERS, M.D., LTD. ("CAN") is a Nevada corporation dba HEART INSTITUTE OF NEVADA, the sole shareholder, officer and director of which is JOHN A. BOWERS, who is its alter ego.

11. Plaintiff is informed and believes and based thereon alleges that PAUL HEEREN is an individual residing in the State of Nevada.

12. Plaintiff is informed and believes and based thereon alleges that PAUL HEEREN, M.D., LTD., is a Nevada corporation, the sole shareholder, officer and director of which PAUL HEEREN, who is its alter ego.

13. Plaintiff (i) is informed and believes and based thereon alleges that other persons and entities whose identities are presently unknown to plaintiff are in some manner responsible for the matters alleged herein and (ii) therefore sues those persons and entities as defendants DOES 1 through 100 and will seek leave of this court to amend this complaint to set forth their precise names and actions once ascertained. Additional discovery will be required in this regard.

JURISDICTION AND VENUE

14. This adversary proceeding is brought under Bankruptcy Rule 7001 in connection with in re Vincent Siragusa, debtor which was filed under Chapter 7 Case Number BK-S-87-3085-LBR in the District of Nevada (the "Bankruptcy Case").

15. This court has jurisdiction of this adversary proceeding under (i) 28 USC 157 and 1334 and (ii) 11 USC 105(a), 506, (541(d), 548, 550(a), 554(b) and 727(d). This complaint also relies in part on Nevada law under pendant jurisdiction.

16. This is a core proceeding under 18 USC 157(b)(2)(A), (H), (J), (K) and (0).

17. Venue is proper in this district because plaintiff is informed and believes and based thereon alleges that each defendant resides, or has a place of business, within this district.

GENERAL ALLEGATIONS

18. On August 19, 1983, plaintiff and debtor as spouses entered into a Property Settlement Agreement which was subsequently incorporated and merged into a Decree of Divorce entered by the Nevada Eighth Judicial District Court in Case No. D58232 (the "Divorce Proceedings") on September 23, 1983. A true copy of that Decree of Divorce with its Property Settlement Agreement attachment is attached as Exhibit "1".

19. At that time:

A. Debtor was a physician specializing in cardiology who was duly licensed to practice as such in the State of Nevada.

B. All of the assets of plaintiff and debtor (the "Marital Assets") were community property of their marriage.

C. Substantially all of the value of the Marital Assets was comprised of a professional medical practice and its related real, personal and intangible assets (collectively the "Medical Practice"), including without limitation an approximately one-third ownership interest in the various HEART INSTITUTE ENTITIES as then constituted.

D. Debtor owed plaintiff a fiduciary duty to fully disclose to and deal fairly with plaintiff.

20. Under the Decree of Divorce, plaintiff essentially promised to release her one-half community property interest in the Medical Practice for a series of deferred payments (the "Marital Payments") from debtor to plaintiff. The Property Settlement Agreement beginning at the top of page 10 provided for the following arrangements to secure the Marital Payments:

> 2. The parties acknowledge and agree that Wife is granting Husband substantial concessions in so deferring the actual receipt of property comprising her one-half (1/2) interest in the community property of the parties and that in exchange therefor Husband expressly agrees, inter alia, that:
>
> * * *
>
> b. Husband shall and hereby does grant Wife an equitable lien against each and all of the property comprising and relating to his professional medical practice and related real, personal and intangible assets and entities utilized in connection therewith together with all accessions thereto for the purpose of securing each and all of his obligations hereunder, agrees to execute such commercially reasonable security instruments in connection therewith as counsel for Wife may from time to time request, and acknowledges understanding that this lien shall be judicially imposed upon merger of this Agreement in a subsequently obtained decree of divorce.

21. Debtor never intended to make the Marital Payments but rather undertook a fraudulent and deceptive course of conduct designed to defeat plaintiff's legitimate rights and interests under the Decree of Divorce (the

"Fraudulent Course of Conduct") in which the other defendants ultimately joined.

22. On February 29, 1984, plaintiff and debtor executed a Security Agreement and UCC-1 Filings to secure the Marital Payments with a lien under Article 9 of the Nevada Uniform Commercial Code (the "Lien") upon the Medical Practice, including all additions and accessions thereto and all proceeds of disposition thereof. The UCC-1 Filings were duly filed with the Nevada Secretary of State and the Clark County, Nevada Recorder on March 5, 1984. True copies of the Security Agreement and the UCC-1 Filings are attached as Exhibits "2" and "3", respectively.

23. All the times during the Divorce Proceedings, including when the Property Settlement Agreement and the Security Agreement were executed, debtor represented to plaintiff that the other owners of the HEART INSTITUTE ENTITIES (i) were aware of the existence and terms of those instruments, (ii) had no objection to their provisions, and (iii) had taken all necessary steps required to consent to those instruments.

24. The HEART INSTITUTE ENTITIES had knowledge of the Property Settlement Agreement and the Security Agreement before and when they were executed and did not inform plaintiff of any objections at that time.

25. Debtor promptly failed to make the Marital Payments due to plaintiff under the Decree of Divorce.

26. On February 29, 1984, plaintiff and debtor entered into an Amendment to Property Settlement Agreement which:

A. Modified and reduced debtor's Marital Payment obligations based upon certain purported financial difficulties which debtor represented to plaintiff were occurring in the HEART INSTITUTE ENTITIES.

B. Required debtor to place and maintain in effect an Antemarital Agreement with any subsequent spouse of debtor precluding the creation of any community property interest of that subsequent spouse and acknowledging the validity, priority and superiority of the claims, liens and rights of plaintiff under the Property Settlement Agreement until such time as debtor shall have performed all of his obligations under the Property Settlement Agreement.

C. Did not modify any of the Security Agreement or lien provisions of the Property Settlement Agreement, but rather provided that all terms of the Property Settlement Agreement not expressly modified by the Amended Property Settlement Agreement would remain in full force and effect.

D. Was subsequently incorporated and merged into an Amended Decree of Divorce entered in the Divorce Proceedings on March 1, 1984.

A true copy of the Amended Decree of Divorce with its Amended Property Settlement Agreement attachment is attached as Exhibit "4".

27. On February 27, 1984, debtor entered into an Antenuptial Agreement with his current spouse which:

A. Assigned a valuation of "approximately $2,000,000" to the Medical Practice and other assets of debtor.

B. Acknowledged the existence, validity, lien and priority of debtor's Marital Payments obligation to plaintiff in the amount of "approximately $1,500,000".

A true copy of the Antenuptial Agreement is attached as Exhibit "5".

28. Debtor promptly failed to make the Marital Payments due to plaintiff under the Amended Decree of Divorce.

29. On January 16, 1987, plaintiff and debtor entered into a Second Amendment to Property Settlement Agreement which:

A. Further modified and reduced debtor's Marital Payment obligations based upon certain further purported financial difficulties which debtor represented to plaintiff were occurring in the HEART INSTITUTE ENTITIES.

B. Was subsequently incorporated and merged into a Second Amended Decree of Divorce entered in the Divorce Proceedings on January 22, 1987.

A true copy of the Second Amended Decree of Divorce with its Second Amended Property Settlement Agreement attachment is attached as Exhibit "6".

30. Debtor promptly failed to make the Marital Payment's due to Plaintiff under the Seconded Amended Decree of Divorce.

31. Around May 1987, debtor informed plaintiff that the financial condition of the HEART INSTITUTE ENTITIES had become so bad that he could not possibly make even the latest reduced Marital Payments due to plaintiff.

Debtor further informed plaintiff that the best debtor could do would be to promise to pay her a substantially reduced set of payments in full satisfaction of the approximately $1,400,000 then due for the Marital Payments (the "Settlement Proposal").

32. When plaintiff rejected the Settlement Proposal, debtor ceased making the Marital Payments.

33. On July 6, 1987, plaintiff moved in the Divorce Proceedings to reduce the Marital Payment arrearages due her to judgment. Debtor and the other defendants accelerated their Fraudulent Course of Conduct For the Specific Purchase of Benefiting Debtor Through Defrauding Plaintiff. The following specific instances illustrate what has been uncovered to this point only after extensive discovery efforts to pierce this web of deception:

A. In the Response of VINCENT SIRAGUSA to Motion of JOANNE M. SIRAGUSA to Reduce Alimony Arrearages to Judgment, and Cross Motion to Modify Decree Based on Mutual Mistake of Fact filed by debtor on August 14, 1987, debtor asserted on pages 6 and 7 that the HEART INSTITUTE ENTITIES were being reorganized (the "Reorganization") due to their severe financial difficulties. Attached as Exhibit "7" is a true copy of that pleading.

B. Plaintiff's counsel informed counsel for the HEART INSTITUTE ENTITIES and certain of its principals that it appeared lien enforcement proceedings under the Security Agreement would become necessary if the HEART INSTITUTE ENTITIES were Reorganized. Attached as Exhibit "8" are copies of letters dated August

18 and 20, 1987 from plaintiff's counsel to HEART INSTITUTE ENTITIES' counsel confirming those concerns and inviting alternative resolution.

C. HEART INSTITUTE ENTITIES' counsel pursued with plaintiff's counsel a series of settlement negotiations concerning plaintiff's rights under the Security Agreement. Attached as Exhibit "9" are copies of a series of letters between those counsel dated August 27, 28 and 31, 1987 confirming those negotiations.

D. During those negotiations, HEART INSTITUTE ENTITIES' counsel informed plaintiff's counsel that certain internal Reorganization plans were being pursued but had not, as of early are September 1987, been consummated. Attached as Exhibit "10" are copies of a letter dated September 4, 1987 from HEART INSTITUTE ENTITIES' counsel to plaintiff's counsel and its Reorganization enclosure which (i) contain an approximately $475,000 reduced Marital Payment proposal by debtor and (ii) state in part:

Reorganization changes in these entities since January 1, 1983:

> As you can see from the documentation, Barry, the only real structural change has been the fact that Cardiology Capital Partnership has been merged into Heart Institute Cath Lab. When Vince liquidated his professional corporation, the joint venture was reorganized to recognize his personal partnership interest. Effective July 1, 1987, Vince incorporated, and the partnership had agreed to the assignment of his Heart Institute of Nevada interest to be assigned to that new corporation. Thus, since July 1, his

partnership draws have been payable to his professional corporation. This was done in an attempt to structure the entity to expand to take on the new partners.

As can be seen from the Heart Institute's letterhead, there are two doctors who have been working as employees of the Heart Institute. It is now the time to re-evaluate their entry into the partnership level, and several negotiations have taken place on the partnership design.

Essentially, it is being contemplated but nor executed, that the partnership would be extensively reorganized. The reorganization would attempt to compensate those individuals who are contributing to the entity as a whole, as well as productivity. It is anticipated that the formula would include a payment of a $10,000 per month draw, plus 25% of collections in excess of $150,000 for the previous quarter. Currently, the independent contractors are on that arrangement, and it is anticipated that the entire partnership would move to that arrangement. If the partnership has any profits in excess of that, profits would be split on a discretionary basis, or potential for a promotional compensation basis. The result of this reorganization would be a lowering of the compensation historically received by the three partners, but the ability to then re-allocate to incorporate new employees and partners into the schemata. This reorganization is applicable to the medical partnership only. Heart Institute Cath lab, and heart Institute Properties, would currently remain the same. It is anticipated that heart institute Properties partners will begin selling their interests

to new partners, but the details, or potential buyers, have not yet been identified.

E. On September 10, 1989, the domestic relations referee in the Divorce Proceedings ruled that plaintiff was entitled to judgment against debtor in an amount in excess of $1,400,000 for Marital Payment arrearages. Attached as Exhibit "11" is a true copy of the Findings entered by the referee in favor of plaintiff on October 8, 1987.

F. Debtor objected to the Findings and the matter was heard by the Nevada Eighth District Court on November 5, 1987. That court adopted the referee's Findings, reduced the Marital Payment arrearages to judgment, and stayed enforcement of the judgment one week to give debtor time to consult with counsel regarding an undertaking on appeal. Attached as Exhibit "12" is a true copy of the minute order of that hearing.

G. Prior to that next hearing, debtor filed his petition (the "Petition") in the Bankruptcy Case on November 10, 1987.

H. Debtor did not file his Schedules and Statement of Affairs (the "Schedules") in the Bankruptcy Case until January 13, 1988. When filed, these items took the unbelievable position that (i) debtor no longer owned any interest in the HEART INSTITUTE ENTITIES and (ii) debtor's Marital Payment obligations to plaintiff had become unsecured.

I. HEART INSTITUTE ENTITIES' counsel also filed with the trustee herein a voluminous set of documents (the "Addendum to Statement of Financial

Affairs") purporting to describe how the debtor's interests in the HEART INSTITUTE ENTITIES had vanished free of plaintiff's Lien. Attached as Exhibit "13" is a copy of the December 14, 1987 letter from HEART INSTITUTE ENTITIES' counsel to the trustee (sans its exhibits) which transmitted the Addendum to the Statement of Financial Affairs. Essentially, the defendants' contend therein that:

(1) Debtor was in default under the HEART INSTITUTE ENTITIES partnership agreements.

(2) In June 1987, debtor's partners gave him notice to cure his default or be forced to sell his interests under the HEART INSTITUTE ENTITIES partnership agreements.

(3) In August 1987, debtor's partners forced the sale of his HEART INSTITUTE ENTITIES interests (the "Sales").

(4) The Sales somehow conveyed his HEART INSTITUTE ENTITIES interests to the HEART INSTITUTE ENTITIES free of plaintiff's Lien.

J. The terms of the Sales are grossly inadequate. For all of the debtor's interest in the HEART INSTITUTE ENTITIES (which had previously given debtor over $400,000 per year of partially tax sheltered cash flow and which debtor had himself value at $2,000,000 in 1984 and $2,400,000 in 1987), debtor's Schedules reveal that he received the following for those interests:

Entity	Description	Bankruptcy Schedule	Face Value($)	Fair Market Value($)
HIN	Accounts Receivable	B-2 Item t	200,000	150,000
CAN	Net Capital Account Deficit	A-2; Proof of Claim	(37,040)	(37,400)
HIP	Long Term Low Interest Unsecured Note Receivable	B-2 Item o	177,500	110,000
HICL	Negative Capital Account Balance	Proof of Claim	(122,977)	(27,977)
Totals			312,483	194,983

See the prior Exhibits containing debtors 1984 Antenuptial Agreement and April 21, 1987 Financial Statements, respectively, for those $2,000,000 and $2,400,000 valuations.

K. The precise terms and propriety of the Sales and Reorganization have been difficult to determine. Debtor has failed to provide even the basic specific supporting information required in the Schedules and has repeatedly resisted plaintiff's efforts to obtain even the most fundamental information on his financial affairs, such as his 1987 federal income tax return. Despite such misconduct by debtor and the unwillingness of the other defendants to cooperate, plaintiff through discovery has been able to locate various items which evidence the

Fraudulent Course of Conduct, including material misstatements and omissions in the Schedules and Addendum to Statement of Financial Affairs:

(1) The HIN partnership agreement was purportedly amended (the "Partnership Agreement Amendment") by debtor and the other partners on June 25, 1987 to add the very forced sale on default provisions under which (i) debtor was purportedly given notice of default (the "Default Notice") on that same date and (ii) the Sale of debtor's interest in HIN was purportedly later forced. Attached as Exhibits "14" and "15", respectively, are true copies of the Partnership Agreement Amendment and the Default Notice.

(2) The events comprising the purported default contained in the Default Notice are different from those contained in concurrent correspondence from HEART INSTITUTE ENTITIES' counsel to debtor. The Default Notice asserts that the default is a purported prohibited assignment of his HEART INSTITUTE ENTITIES interests. A letter from HEART INSTITUTE ENTITIES' counsel to debtor dated June 26, 1987 admonishes debtor that his poor personal financial condition and inability to fund the failing HEART INSTITUTE ENTITIES is the default. Neither of these purported defaults actually existed. A true copy of that letter is attached as Exhibit "16".

(3) The August 1987 dates on which the Sales were purportedly made HEART INSTITUTE ENTITIES are inconsistent with Partnership Agreement Amendment and the Default Notices to as well as other documents located to date:

(a) Recall that as of September 4, 1987, HEART INSTITUTE ENTITIES' counsel (i) had represented that no structural changes had taken place in the HEART INSTITUTE ENTITIES and (ii) was negotiating with plaintiff's counsel to protect debtor's interests in the HEART INSTITUTE ENTITIES.

(b) On September 9, 1987, debtor filed the Response of Vincent Siragusa to Reply of Joanne Siragusa and Application for Writ of Coram Vobis to Correct Judgment in the Divorce Proceedings which asserted the existence of his interests in, and the ongoing difficulties of, the HEART INSTITUTE ENTITIES. This pleading mentioned no pending (let alone completed) Sale of those interests but rather asked that court for relief to protect those interests. Attached as Exhibit "17" is a true copy of that pleading.

(c) A September 3, 1987 letter and enclosures from defendant JOHN A. BOWERS reveal that as of that time the "partners", including debtor, were proceeding with a $3,250,000 refinancing project through Valley Bank of Nevada. Attached as Exhibit "18" are true copies of that September 3, 1987 letter and its enclosures.

(d) As late as September 21, 1987, debtor was still executing documents as a partner of the HEART INSTITUTE ENTITIES. Attached as Exhibit "19" is a true copy of an "Acknowledgment Agreement" bearing that date and signed by debtor as a partner.

(4) Even though debtor's purported default to the HEART INSTITUTE ENTITIES was allegedly so severe as to justify the forced Sale of his interests therein, HIN entered into an Independent Contractor Agreement

with debtor's professional corporation effective concurrently with the purported Sale. Under that Agreement, debtor was to (i) render to HIN the same cardiology services which he had rendered as a partner and (ii) receive "compensation" under a profit sharing formula which is equivalent to his prior HEART INSTITUTE ENTITIES profit sharing interest. Attached as Exhibit "20" is a true copy of that Agreement.

(5) Around the time when debtor filed his Petition in the Bankruptcy Case, CAN (as HIN's purported successor) terminated the then existing Independent Contractor Agreement with debtor's professional corporation and replaced it with a virtually identical new Independent Contractor Agreement with debtor personally. Attached as Exhibit "21" is a true copy of that new Independent Contractor Agreement.

(6) Within 20 days of the November 10, 1989 date when debtor filed his Bankruptcy Petition, debtor's professional corporation received from HIN almost $100,000 in cash distributions which were in turn paid to debtor as compensation. Despite this tremendous cash flow, including over $10,000 on the very Petition date, debtor not only filed the Bankruptcy Case but also ultimately revealed absolutely no cash on his Schedules. Attached as Exhibit "22" are true copies of accounting ledgers from debtor's professional corporation showing these (and other substantial other) cash transfers up to the Petition date.

(7) This total lack of any cash on the Schedules is even more difficult to understand when considered in conjunction with the financial information

revealed in the Divorce Proceedings. In the Response of VINCENT SIRAGUSA to Motion of JOANNE M. SIRAGUSA to Reduce Alimony Arrearages to Judgment, and Cross Motion to Modify Decree Based on Mutual Mistake of Fact filed by debtor on August 14, 1987, attached as Exhibit "7" debtor contended beginning at line 12 on page 5 that his distributions from the HEART INSTITUTE ENTITIES were "only" (i) $315,000 in 1986 ($26,250 per month) and (ii) $132,000 for the first five months of 1987 ($26,400 per month). In the concurrently filed Defendant's Exhibits A Through L, debtor contended that his monthly living expenses were $28,415 per month, including a $7,200 monthly Marital Payment to plaintiff. As will be shown in detail below, debtor's contentions of his income and expenses throughout the Divorce Proceedings as well as this Bankruptcy Case are substantially under and over stated, respectively. However, even assuming arguendo that debtor had not understated his income or overstated his other expenses, debtor did not make the required Marital Payments to plaintiff since May 1987 and therefore accumulated approximately $35,000 ($7,000 x 5) of "extra" funds during the last 5 months preceding the Petition date. Again, none of these funds appeared on the Schedules. Attached as Exhibit "23" is a true copy of debtor's Exhibits A Through L in the Divorce Proceedings.

(8) Further, the Schedules contain absolutely no express reference to or disclosure of debtor's professional corporation which received over $200,000 from HIN during the four months before the petition. In response to repeated inquiries about this entity, debtor's counsel has merely indicated that the $200,000 entry

opposite item t on Schedule B-2 concerning stock interests reflects the uncollected accounts receivable due to debtor's professional corporation as of the filing of the Petition. While no supporting information had yet been provided showing how this $200,000 amount was determined, that figure is substantially less than (i) the $330,000 amount of debtor's HIN receivables contained in debtor's Financial Statement dated April 21, 1987 and (ii) the $545,071 amount of debtor's HIN receivables contained in a schedule entitled HEART INSTITUTE OF NEVADA (Partnership), PROJECTION OF BANKRUPTCY TERMINATION NOVEMBER 10, 1987. Attached as Exhibits "24" and "25", respectively, are true copies of that April 21, 1987 Financial Statement and November 10, 1987 Bankruptcy Projection.

(9) Despite debtor's assertions to the contrary, the HEART INSTITUTE ENTITIES have been far more profitable and valuable as of and after the time the debtor filed his Bankruptcy Petition on November 10, 1987 than they were when debtor valued his interests therein at $2,000,000 in his 1984 Antenuptial Agreement and $2,400,000 ($1,200,000 x 2) in his April 21, 1987 Financial Statement. The number of entities comprising the HEART INSTITUTE ENTITIES, as well as the frequency and variety of changes in the ownership of and relationships to those entities, makes it difficult to analyze the financial condition of the HEART INSTITUTE ENTITIES. However, the information made available to plaintiff at this point reveals that what needs to be determined is the extent to which the financial condition of the HEART INSTITUTE ENTITIES has been continuously improving since inception, not whether it is declining. More specific

allegations will be made on this point once further discovery has been completed. In the interim, it can be generally noted that:

(a) The 1987 federal income tax return for HIN (which Reorganized part way through the year and in which debtor was a partner for only part of the year) showed guaranteed payments and income to the partners of approximately $1,200,000 in 1987 as compared to approximately $1,000,000 shown in the comparable 1986 return. Attached as Exhibits "26" and "27" are true copies of those returns.

(b) The limited financial information available on HIN through this point is sufficient to demonstrate that the HEART INSTITUTE ENTITIES are in an increasingly better financial condition through 1988, which financial improvement is confirmed by the personal financial information obtained regarding debtor.

(c) When plaintiff's counsel went to the office building owned by HIP for discovery purposes in August 1988, the discovery efforts were actually conducted in an adjacent building which plaintiff's counsel was informed had been leased to provide offices to the HIN staff because HIN's medical work had so out grown the HIP building.

(d) Since before and continuing after the filing of debtor's Bankruptcy Petition, HIN has paid for substantial television and other media advertising which prominently features debtor as HIN's primary spokesman.

(10) While debtor has failed to provide his 1987 individual federal income tax return despite repeated requests, information on distributions to debtor from the HEART INSTITUTE ENTITIES reveals that 1987 was a "record breaking" year for him. Despite being removed as a partner and filing the Petition on November 10, 1987, debtor's net cash distributions from the HEART INSTITUTE ENTITIES were the following staggering amounts for the period from January 1 to November 10, 1987:

PAYING ENTITY	AMOUNT($)
VINCENT SIRAGUSA, M.D., LTD. – Compensation	201,100
HIN – Guaranteed Payments	202,000
HIP – Distributions	20,663
Total for Approximately 10 Months	423,763
Annualized (12/10)	508,516
Monthly Average (10 Months)	42,376

Attached as Exhibit "28" are true copies of (i) the 1987 federal income tax return of VINCENT SIRAGUSA, M.D., LTD. (and) the Form K-1's for debtor from the HEART INSTITUTE ENTITIES.

(11) The limited financial data obtained from the HEART INSTITUTE ENTITIES' to this point indicates that debtor's cash flow has increased rather than decreased following his Bankruptcy Petition. Recall that debtor signed yet another percentage compensation Independent Contractor Agreement concurrently with filing that Petition. For example, cash distributions by HIN

(or its successor) to one of debtor's professional corporations were approximately $72,000 for the months of April and May 1988. Attached as Exhibit "29" is a true copy of CAN's May 31, 1988 General Ledger page 109 showing $72,113.76 of cash distributions to VINCENT SIRAGUSA, M.D., CHARTERED during those two months.

(12) From the time of the original divorce until he filed the Petition, debtor's net cash flow from the Medical Practice exceeded $1,500,000 (minimum average of $30,000 x 50 months), yet he paid plaintiff less than $315,000 during this period for her community property one-half interest in the Medical Practice.

(13) After the Petition, debtor's net cash flow from the Medical Practice has been in excess of $540,000 (minimum average of $30,000 x 18 months), yet he has paid plaintiff less than $75,000 in alimony (only after plaintiff forced such payments through court proceedings).

(14) Recall also debtor's effort to claim an "extra" $3,000 property exemption despite the prohibition of the Antemarital Agreement, which is the subject of a separate motion by the trustee.

(L) The net result of the Fraudulent Course of Conduct, without court intervention, will be that debtor is working in the same profession with the same persons in the same location for the same entities with the same high community profile and making more money immediately after purportedly being "forced" to (i) sell his interests in the HEART INTITUTE ENTITIES (for negative amounts in some cases) and thereafter (ii) file the Bankruptcy Petition.

FIRST CLAIM FOR RELIEF
(Determine Validity, Priority and Extent of Lien)

34. Plaintiff realleges paragraphs 1 through 33 of this complaint.

35. The Decree of Divorce required debtor to carry out the provisions of the Property Settlement Agreement, including without limitation execute the Security Agreement and UCC-1 Filings.

36. Debtor created the Lien upon the Medical Practice under Article 9 of the Nevada Uniform Commercial Code in 1984 when he executed the Security Agreement and UCC-1 Filings.

37. Plaintiff perfected the Lien in 1984 by recording the UCC-1 Filings required by Article 9.

38. The Lien is senior to all other liens on the Medical Practice.

39. Debtor has failed to pay the Marital Payments and perform the other obligations secured by the Lien.

40. Defendants have asserted that the Lien does not exist and that other liens on the Medical Practice held by certain of the defendants are senior to plaintiff's Lien.

41. This court should determine the validity, priority and extent of the Lien on the Medical Practice.

SECOND CLAIM FOR RELIEF
(Set Aside Fraudulent Conveyance and Subsequent Transfers)

42. Plaintiff realleges paragraphs 1 through 41.

43. The trustee has previously stipulated and this court has ordered plaintiff may bring this claim for relief for the benefit of the debtor's Bankruptcy estate.

44. Debtor's purported Sale of the Medical Practice in August 1987 is voidable as a fraudulent conveyance under (i) Bankruptcy Code Section 548 and (ii) by Bankruptcy Code Section 544(b) and the Nevada Uniform Fraudulent Conveyance (or Transfer) Act (whichever may have been an effect on the true date of the Sale) on one or more of the following grounds which are alternatively plead:

A. The purported Sale of the Medical Practice was made when the debtor was insolvent and was made for less than a reasonably equivalent value or a fair consideration.

B. The purported Sale of the Medical Practice made debtor insolvent and was made for less than a reasonably equivalent value or a fair consideration.

C. The purported Sale of the Medical Practice was made while debtor was engaged in business for which his remaining property was unreasonably small capital and was made for less than a reasonably equivalent value or a fair consideration.

D. The purported Sale of the Medical Practice was made with the actual intent to hinder, delay or defraud plaintiff.

45. Plaintiff is informed and believes and based thereon alleges that the Medical Practice Sold by debtor has been further transferred after the Sale (the "Subsequent Transfers") among certain of the defendants by transfers made without value and with knowledge of the voidability of the Sale. The Subsequent Transfers are subject to recovery under Bankruptcy Code Section 550(a).

THIRD CLAIM FOR RELIEF
(Declare Constructive Trust, Compel Restoration and Accounting, and Determine Extent of Property of Estate)

46. Plaintiff realleges paragraph 1 through 45.

47. Debtor induced plaintiff to enter into the Property Settlement Agreement and thereby acquired legal title to plaintiff's undivided one-half of the combined interest of plaintiff and debtor in the Medical Practice ("Plaintiff's Interest in the Medical Practice") by the Fraudulent Course of Conduct, which included without limitation intentional misrepresentations that debtor would hold and use Plaintiff's Interest in the Medical Practice for the purpose of making the Marital Payments.

48. The fair value of Plaintiff's Interest in the Medical Practice was substantially in excess of the Marital Payments actually made by debtor to plaintiff both (i) at the time the Property Settlement Agreement was entered into and (ii) at all times since then through and including this time.

49. By reason of debtor's Fraudulent Course of Conduct and to prevent debtor from being unjustly enriched thereby, a constructive trust in favor of plaintiff arose

with respect to Plaintiff's Interest in the Medical Practice whereby all debtor ever received from plaintiff was legal title to Plaintiff's Interest in the Medical Practice and plaintiff retained all equitable interest therein.

50. The purported August 1987 Sale of the Medical Practice by debtor and the purported Subsequent Transfers thereof among certain of the other defendants passed no more than mere legal title to Plaintiff's Interest in the Medical Practice, subject to the constructive trust in favor of plaintiff.

51. Debtor and each defendant involved in the Subsequent Transfers of Plaintiff's Interest in the Medical Practice have a duty to (i) transfer and deliver to plaintiff all of Plaintiff's Interest in the Medical Practice remaining in their possession or control and (ii) account to plaintiff for the fair value thereof and all income relating thereto.

52. Plaintiff has no adequate remedy at law.

53. Plaintiff's Interest in the Medical Practice is property of debtor's estate in this Bankruptcy Case under Bankruptcy Code Section 541(d) only to the extent of debtor's legal title thereto, but not to the extent of plaintiff's equitable interest therein under the constructive trust.

FOURTH CLAIM FOR RELIEF
(Determine Dissolution and Appoint Receiver to Wind Up, Terminate and Prepare Accounting for Dissolved Partnership)

54. At the time the Lien in favor of plaintiff on the Medical Practice was created and perfected, each of the

HEART INSTITUTE ENTITIES was a general partnership (or a functionally equivalent joint venture) under Nevada law.

55. Plaintiff is informed and believes and based thereon alleges that sometime between the date that Lien was created and perfected and the date debtor filed his Bankruptcy Petition, each of the HEART INSTITUTE ENTITIES was dissolved within the meaning of N.R.S. 87.290 by one or more of the causes of dissolution contained in N.R.S. 87.310 resulting from the purported Sale of debtor's interest therein, the Subsequent Transfers thereof, the purported Reorganization of the HEART INSTITUTE ENTITIES, and the Bankruptcy Case.

56. Debtor and the other defendants controlling the HEART INSTITUTE ENTITIES have failed to proceed with the winding up and termination of the dissolved HEART INSTITUTE ENTITIES, or to render to plaintiff any accounting in connection therewith, as required by the applicable partnership agreements and Nevada law, but rather have denied the existence of the dissolutions and instead continued to conduct the business of the dissolved HEART INSTITUTE ENTITIES under the guise of the purported Reorganization as a part of the Fraudulent Course of Conduct to deprive plaintiff of her Marital Payments and related rights.

57. Under these circumstances, plaintiff is entitled to (i) a court decree dissolving each of the HEART INSTITUTE ENTITIES pursuant to N.R.S. 87.320, (ii) a winding up of each of the HEART INSTITUTE ENTITIES by this court pursuant to N.R.S. 87.370, and (iii) an accounting

for each of the HEART INSTITUTE ENTITIES from the date of Dissolution pursuant to N.R.S. 87.430.

58. The circumstances also make it necessary and appropriate for this court to appoint the trustee as a reciever to take possession of the assets of HEART INSTITUTE ENTITIES, wind up their unfinished business, prepare an accounting, and distribute the assets of HEART INSTITUTE ENTITIES to the creditors and others entitled thereto pursuant to N.R.S. 87.400.

FIFTH CLAIM FOR RELIEF
(Revocation of Discharge)

59. Plaintiff realleges paragraphs 1 through 58.

60. This court granted debtor a discharge less than one year ago on May 4, 1988.

61. The discharge was obtained through the fraud of the debtor as evidenced by the Fraudulent Course of Conduct by debtor.

62. Plaintiff did not know of debtor's fraud until after the discharge was granted.

63. The discharge should be revoked under the Bankruptcy Code Section 727(d).

SIXTH CAUSE OF ACTION
(Conspiracy)

64. Plaintiff realleges paragraphs 1 through 63.

65. Plaintiff is informed and believes and based thereon alleges that each and all of defendants in concert (i) formed a common plan and design to defraud plaintiff

out of her rights under the Divorce Instruments, especially with respect to the Lien on the Medical Practice, (the "Conspiracy") and (ii) actively participated in, aided, abetted, ratified and adopted for their own benefit the actions of the other defendants in furtherance of the Conspiracy.

66. As a direct, foreseeable and proximate result of the Conspiracy, plaintiff has suffered compensatory damages in an amount of excess of $10,000.

67. In furthering the Conspiracy, defendants have acted so maliciously, fraudulently and oppressively as to justify the imposition of punitive damages against them in an amount in excess of $10,000.

WHEREFORE, plaintiff prays that this court:

1. Determine that the Lien on the Medical Practice is a valid senior lien on the Medical Practice securing performance of all debtor's obligations under the Property Settlement Agreement as amended, including without limitation the Marital Payments in a sum in excess of $10,000 according to proof.

2. Declare the Sale and all Subsequent Transfers to be null and void and order their rescission.

3. Declare that the Constructive Trust in favor of plaintiff arose with respect to Plaintiff's Interest in the Medical Practice, whereby all debtor ever received from plaintiff was legal title thereto; compel debtor and all other defendants involved in the Subsequent Transfers to (i) transfer and deliver to plaintiff all interests therein remaining in their possession or control, (ii) account to plaintiff for the fair value thereof and all income relating

thereto, and (iii) pay plaintiff all sums due under that accounting; and determine that Plaintiff's Interest in the Medical Practice is property of debtor's estate only to the extent of debtor's legal title thereto but not to the extent of plaintiff's equitable interest therein.

4. Determine that each of the HEART INSTITUTE ENTITIES has been dissolved and appoint the trustee as a receiver to wind up, terminate, and prepare an accounting for the dissolved entities.

5. Revoke debtor's discharge.

6. Award plaintiff compensatory damages against all defendants in a sum in excess of $10,000 according to proof.

7. Award plaintiff punitive damages against all defendants in a sum in excess of $10,000 according to proof.

8. Award plaintiff reasonable fees and costs against all defendants for prosecuting this action.

9. Grant plaintiff such other and further relief as appropriate.

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Supreme Court, U.S.
F I L E D
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CLERK

No. 95-1723

In The

Supreme Court of the United States

October Term, 1995

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA, and JOANNE SIRAGUSA,

Petitioners,

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., and BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a civil RICO action accrues prior to the conclusion of the bankruptcy proceedings where the defendants' unlawful scheme is based on fraudulently obtaining a discharge of a pre-existing debt and where plaintiff may suffer no injury until the final discharge in bankruptcy.

2. Whether a civil RICO action accrues when the plaintiff knows or should know that she has been injured, even though she does not know that her injury was part of a pattern of racketeering activity or that defendants caused her injury.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-25a) is reported at 75 F.3d 506. The opinion of the United States District Court for the District of Nevada dismissing the complaint (Pet. App. 26a-34a) is unreported. The opinion of the district court denying petitioners' motion for reconsideration (Pet. App. 35a-43a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1996. The petition for a writ of certiorari was filed on April 22, 1996, and was granted June 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant federal statutory provisions are the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994), which was passed as Title IX of the Organized Crime Control Act of 1970 (Act of October 15, 1970, Pub. L. No. 91-452, 84 Stat. 922, as amended).

STATEMENT OF THE CASE

This case involves an unlawful scheme orchestrated by attorney Patricia Brown and doctors Vincent Siragusa and John Bowers to defraud plaintiff Joanne Siragusa of the multi-million dollar divorce settlement debt which was owed her by Dr. Vincent Siragusa and partially

secured by a lien on his medical practice. Defendants also engaged in a scheme to defraud Dr. Paul Heeren of his interest in the medical practice, which was the largest cardiology medical practice in the State of Nevada. As a consequence of defendants' unlawful and fraudulent activities, Dr. Bowers became the sole owner of the medical practice and, with the active participation of Brown, engaged in further fraudulent transactions relating to the sale of a minority interest in the practice to a number of other physicians. In this RICO action, Joanne Siragusa seeks to recover for injuries that she has suffered as a result of Patricia Brown's wrongful conduct.

Because this case was dismissed by the district court in response to a motion to dismiss under Fed. R. Civ. P. 12(b)(6) filed at the outset of the case,[1] the factual allegations in the Complaint are taken as true and are not in dispute.[2]

1. Vincent and Joanne Siragusa divorced in 1983. At that time, Vincent owned a one-third interest in a cardiology practice called the Heart Institute of Nevada ("HIN"); Drs. Paul Heeren and John Bowers held the remainder equally.[3] As part of the divorce, Joanne agreed

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[1] Although the court of appeals characterized defendant Brown's motion as one for summary judgment (Pet. App. 6a), defendants offered no declarations, documents or other evidence addressing the substantive allegations in the Complaint.

[2] Except as noted, this statement of the facts follows the factual recitation in the opinion of the court of appeals.

[3] This was not the only organization in which Vincent Siragusa owned a share. He also owned 33% in the Heart Institute Cath Lab ("HICL") and 27.55% in the Heart Institute Property ("HIP"). These organizations are collectively known as "the medical practices."

to release her one-half community property interest in Vincent's ownership share in the medical practices in exchange for monthly payments. Joanne perfected a security interest in Vincent's share of the practices to protect her in the event that Vincent defaulted on his payments. When Vincent defaulted in 1987, Joanne secured a state court judgment for the full amount of his debt. This judgment was for an amount in excess of $1.4 million.

Within days of this state court judgment, Vincent filed for bankruptcy under Chapter 7 of the U.S. Bankruptcy Code. With the active participation of attorney Patricia Brown, Vincent submitted in the bankruptcy proceedings a number of false and fraudulent schedules, letters, and other documents which claimed that he lacked the assets to pay his debt to Joanne. Principally, he claimed that he no longer owned his interest in the medical practices. Vincent asserted in these false bankruptcy pleadings that he was forced to sell his interest in the medical practices at a loss and to become a mere employee when the practices were reorganized into the Cardiology Associates of Nevada ("CAN"). Relying on these assertions regarding the fraudulent reorganization, Vincent sought from the bankruptcy court a discharge of the $1.4 million judgment obtained by Joanne, as well as his other debts.[4]

In May 1989, Joanne and Vincent's bankruptcy trustee, Tom Grimmett, filed an adversary complaint in bankruptcy court on behalf of Vincent's estate seeking to

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[4] Because the bulk of Joanne's state court judgment against Vincent was based on her community property settlement and was not alimony or child support, this judgment was subject to being discharged in a bankruptcy proceeding. 11 U.S.C. § 523(a); *see, e.g., In re Buckallew*, 172 B.R. 927 (Bankr. W.D. Mo. 1994).

set aside Vincent's purported transfers of the various medical practices as fraudulent conveyances and challenging any bankruptcy discharge of Vincent.[5] (J.A. 186) Joanne alleged that Vincent, along with Dr. Bowers and Dr. Heeren, had conspired to cheat Joanne out of the monies owed her which were secured by her lien on Vincent's interest in the practices.[6] Joanne alleged that because of secret side agreements, Vincent continued to make as much money as he did before and retained a "sub rosa" interest in the medical practices. In this adversary bankruptcy complaint, Joanne charged that the reorganization amounted to a "common plan . . . to defraud [her] out of her rights under the Divorce Instruments." (J.A. 214-15)

In December 1990, Joanne learned for the first time that Dr. Heeren had also been the victim of various fraudulent reorganizations and that Patricia Brown had been a principal architect of these unlawful schemes. At that time, Dr. Heeren came forward and provided Joanne with an affidavit concerning the fraudulent reorganizations and bankruptcy pleadings. In the affidavit dated December 28, 1990, Dr. Heeren explained that he, too, had been defrauded by the reorganization schemes. Although

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[5] The adversary complaint sought to set aside the fraudulent conveyance under 11 U.S.C. §§ 548 and 544(a) and the Nevada Uniform Fraudulent Transfer Act and to challenge the discharge under 11 U.S.C. § 727(d).

[6] Contrary to the statement of facts in the Ninth Circuit's opinion, the adversary complaint in bankruptcy court clearly did *not* allege that HIN's attorney, Patricia Brown, was involved in the conspiracy to cheat Joanne. Brown's role in the illegal conspiracy was not known to petitioners until December 1990 when Dr. Heeren disclosed it. Until that time, petitioners indulged the reasonable assumption that HIN's attorney was not culpably involved in her client's wrongdoing.

Dr. Heeren was supposed to have received his same share of profits under the side agreements, he had not. In his affidavit, Dr. Heeren also noted that Patricia Brown had masterminded the schemes to defraud Joanne and Heeren and take over the medical practice.

In February 1991, Joanne filed an amended adversary complaint in bankruptcy, adding Brown and her law firm, Beckley, Singleton, Delanoy, Jemison & List, as defendants in that action. However, by orders entered on September 1, 1993 and January 5, 1994, the district court dismissed Joanne's claims in bankruptcy against Brown and the law firm, ruling that the bankruptcy court lacked subject matter jurisdiction to resolve these claims.[7]

2. In November 1993, Joanne and Grimmett filed this civil RICO action in federal court against Patricia Brown and her law firm.[8] (J.A. 16) Their Complaint alleged a pattern of racketeering activity having four goals: (1) to acquire and maintain Vincent's medical practice interest by fraud, and thereby deprive Joanne of the monies owed her which were secured by Vincent's interest in the medical practice; (2) to acquire and maintain Dr. Heeren's medical practice interest by fraud; (3) to defraud the CAN junior stockholders;[9] and (4) to obstruct

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[7] In 1990 and 1991, the bankruptcy judge had ruled that she did have jurisdiction over Joanne's claims.

[8] In 1992, Dr. Bowers settled out of court with petitioners and therefore was not named as a party in this case.

[9] Joanne also had learned that, from April 1991 to November 1991, Dr. Bowers sold 49% of CAN's stock ownership to CAN's doctor-employees. At that time, Dr. Bowers and attorney Brown falsely assured the junior stockholders that Joanne's 1989 bankruptcy complaint exposed CAN to at most $250,000 in liability. They did not tell the junior stockholders that Joanne also sought to undo the reorganization. When Dr.

justice. The Complaint also asserted that Brown masterminded the entire unlawful scheme. The alleged scheme included numerous federal law violations as RICO predicate acts, including bankruptcy fraud (18 U.S.C. § 152), mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), obstruction of justice (18 U.S.C. § 1503), and fraud in the sale of securities under various securities laws (*e.g.*, 17 C.F.R. 240.10b-5). The Complaint also alleged several state law violations, including grand larceny, embezzlement, obtaining money by false pretense, perjury or subornation of perjury, offering false evidence, and securities fraud. (J.A. 40-47)

Brown and her law firm ("Beckley") moved to dismiss the RICO suit as barred by the four-year statute of limitations. The defendants claimed that Joanne and Grimmett knew of their injury in May 1989 when they filed the adversary complaint in bankruptcy court. Brown and Beckley argued that the district court should invoke an "injury discovery" rule, under which a civil RICO cause of action accrues once the plaintiff reasonably discovers her injury. Defendants asserted that, because the civil RICO action was filed more than four years after Joanne and Grimmett knew of the injury, it was barred under RICO's four-year statute of limitations period.

In response, Joanne and Grimmett argued that although they were aware of Joanne's injury by May 1989, they were not aware that there were other victims of the scheme and that their injury was part of a pattern of racketeering activity. They also were unaware of Patricia Brown's role as an active and willing participant in

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Bowers settled with plaintiffs, CAN was required to pay substantially all of the $1.4 million settlement payment.

this wrongdoing when they filed their adversary proceeding in bankruptcy. Petitioners argued that a civil RICO action does not accrue until the plaintiff discovers that her injury was part of a pattern of racketeering activity and defendants' involvement in the RICO scheme. Under the "injury and pattern discovery" accrual rule followed by several circuits, petitioners' RICO claims did not accrue until December 1990, when Dr. Heeren revealed the scope of the fraudulent scheme and the fact that he too was victimized by it. Until that time petitioners had no basis for alleging a pattern of racketeering activity or for charging Brown and her law firm with any wrongdoing.

Joanne and Grimmett also argued that the accrual of the statute of limitations period should not run during the course of the bankruptcy proceedings. Petitioners relied upon a line of cases beginning with *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d. Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989), to support their argument. In closely comparable circumstances involving bankruptcy proceedings, the *Bankers Trust* court held that a RICO action does not accrue before the existence and amount of any injury becomes clear. Because petitioners might suffer no injury depending on the outcome of the bankruptcy proceedings, *Bankers Trust* and subsequent cases held that the time for bringing a civil RICO action should not begin to run until after the bankruptcy. In addition, because Brown actively concealed her wrongdoing from petitioners, the doctrine of fraudulent concealment should also toll the running of the limitations period.

The district court dismissed the complaint. The court "recognize[d] that when plaintiffs filed their Adversary Proceeding complaint [in bankruptcy court], they may not have been aware, as they allege now, that defendant

Brown was involved in any allegedly fraudulent activity. Nevertheless, the rule in this Circuit focuses on when a plaintiff knew or should have known of his injury, and not when that plaintiff knew or should have known that a particular person caused that injury." (Pet. App. 32a) The district court failed to address petitioners' arguments in support of the "injury and pattern discovery" accrual rule, except to note that that was not the accrual rule followed in the Ninth Circuit. The court also rejected petitioners' arguments that the statute of limitations should not run until after the bankruptcy proceedings, concluding in response to petitioners' motion for reconsideration that the *Bankers Trust* line of cases was unpersuasive. (Pet. App. 35a-45a)

3. The court of appeals affirmed, rejecting each of petitioners' alternative limitations argument. (Pet. App. 1a-25a) The panel recognized that there was a clear disagreement among the circuit courts as to when a RICO cause of action should accrue, with at least five courts of appeals finding the "injury discovery" rule to be too restrictive for plaintiffs. Nevertheless, the panel perceived the "injury discovery" rule to be existing Ninth Circuit law and thought that petitioners' criticisms of the "injury discovery" rule were not "persuasive enough to warrant abandonment" of that rule in favor of the "injury and pattern discovery" rule. (Pet. App. 12a) The court also rejected petitioners' argument that the statute of limitations should not run during the pendency of the bankruptcy because plaintiffs may suffer no injury depending on the result of the bankruptcy proceeding. Although acknowledging that petitioners would prevail if the *Bankers Trust* line of cases were the law in the Ninth Circuit (Pet. App. 23a-24a), the court of appeals flatly disagreed with that line of authority. (Pet. App. 22a-25a)

4. Joanne and Grimmett subsequently sought review by this Honorable Court with respect to two issues. First, they asked this Court to examine the Ninth Circuit's decision as to what accrual rule applies to a civil RICO cause of action. At least three different accrual rules are currently applied by the various judicial circuits: the "injury discovery" rule, *see, e.g., Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); the "injury and pattern discovery" rule, *see, e.g., Granite Falls Bank v. Henrikson*, 924 F.2d 150 (8th Cir. 1991); and the "last predicate act" rule, *see, e.g., Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). (Pet. App. 7-13) Second, they asked this Court to determine whether a civil RICO cause of action can accrue prior to the conclusion of bankruptcy proceedings where the existence or extent of any injury will depend on the outcome of the bankruptcy proceedings. A number of courts of appeals have followed the *Bankers Trust* line of cases, which the Ninth Circuit rejected in dismissing petitioners' claim. (Pet. App. 13-17)

This Court granted certiorari as to both questions on June 17, 1996.

SUMMARY OF ARGUMENT

1. A RICO cause of action cannot exist without an "injury to business or property." *Sedima, S.P.L.R. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Here, it cannot be determined whether Joanne Siragusa will suffer such an injury until the conclusion of the bankruptcy proceedings. Vincent's property settlement debt to Joanne predated the RICO activity of the defendants. The RICO scheme, including the fraudulent reorganization of the medical practice and false bankruptcy filings, was aimed at

achieving a final discharge of Vincent's debt in the bankruptcy proceedings. The bankruptcy proceedings, however, have not yet concluded, as the bankruptcy trustee is still continuing to pursue assets of the estate. Only if Joanne is ultimately compelled to accept less than 100% of her pre-existing debts at the conclusion of the bankruptcy proceedings and the final discharge of Vincent's debt, will she have suffered an injury to business or property.

Although defendants have engaged in a pattern of racketeering activity in an attempt to defeat Vincent's pre-existing debt, the RICO injury may not occur unless or until a discharge is granted and Joanne receives less than the full amount owed her. Where a violation has already occurred but plaintiff has not yet been injured, a cause of action has not yet accrued. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). The Second Circuit has applied this principle to a defendant's attempt to obtain a fraudulent discharge of a debt in bankruptcy, holding that the RICO injury is incurred only when the trustee is unsuccessful in recovering the assets necessary to pay off the pre-existing debt. *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989). The statutory provision governing bankruptcy fraud also provides that the statute of limitations does not begin to run until final discharge of the debtor. 18 U.S.C. § 3284.

Vincent's pre-existing debt to Joanne is unaffected by the attempted fraudulent transfers and false bankruptcy filings. At most, these events reveal an attempt by the defendants to injure Joanne's security interest that protected the pre-existing property settlement debt. Until the debt is "lost" and the security interest is called upon and found insufficient, Joanne has suffered no RICO injury.

See Lincoln House, Inc. v. Dupre, 903 F.2d 845 (1st Cir. 1990); *Bennett v. Centerpoint Bank*, No. 91-1603, 1991 U.S. App. LEXIS 32856 (1st Cir. Dec. 31, 1991); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 728 (1995); *Berg v. First State Insurance Co.*, 915 F.2d 460 (9th Cir. 1990).

At the time that Joanne filed her adversary complaint in bankruptcy court – at which time, according to the court of appeals, her RICO claim accrued – she had suffered no "concrete financial loss." Neither the bankruptcy petition nor the fraudulent reorganization diminished Vincent's property settlement debt to Joanne. The lack of financial injury is demonstrated by Joanne's adversary complaint in bankruptcy which sought only equitable relief. Equitable relief is unavailable to RICO plaintiffs. *See Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). Joanne will not suffer a RICO injury unless or until her pre-existing debts are discharged as a result of the RICO activity at less than 100% of their full amount.

2. Although RICO does not contain a specific provision directly addressing accrual, RICO's language, structure and policies demonstrate that the statute of limitations should not begin to run until the plaintiff reasonably knows *both* her injury *and* that her injury was the result of a pattern of racketeering. "[T]he heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 154 (1987) (emphasis in original). In defining a "pattern of racketeering activity" as at least two predicate acts "the last of which occurred within ten years . . . after the commission of a prior act," 18 U.S.C. § 1961(5), the RICO statute plainly anticipated that proof of the RICO scheme would involve an examination of

defendant's activities up to ten years in the past. In addition, the predicate acts identified in RICO include numerous fraud-related violations. 18 U.S.C. § 1961(1). As a result, the potential plaintiff will face significant obstacles in discovering a RICO cause of action because the RICO scheme will likely involve uncovering multiple frauds operating through legitimate businesses and unions. The "injury and pattern discovery" rule is superior in that it recognizes the inherent problems that confront victims of fraud schemes in developing a RICO claim and ties the accrual of the civil RICO action to discovery of the RICO pattern. Furthermore, the "injury and pattern discovery" rule is consistent with the statute's mandate that RICO's provisions "be liberally construed to effectuate its remedial purpose." RICO, ch. 96, § 904(a), 84 Stat. 947 (1970).

The "injury and pattern discovery" rule also comports with general federal law principles of accrual. In *United States v. Kubrick*, 444 U.S. 111 (1979), the Court held that the limitations period would begin to run only after the plaintiff reasonably discovered the "factual predicate" underlying a claim, including the "critical facts" of the injury and who "inflicted the injury." Here, Joanne Siragusa did not know the "factual predicate" of her claim or that Patricia Brown had knowingly participated in these wrongful acts until Dr. Heeren came forward in December 1990 to describe the pattern of racketeering conduct. In federal fraud cases, courts also have required that plaintiff discover the fraud, and not just the injury, before the limitations period will begin to run. In addition, the Court's treatment of "continuing violations" postpones the commencement of the limitations period for older unlawful acts where some of the improper conduct is within the requisite limitations period. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) ("a 'continuing violation' of the Fair Housing Act should be treated differently from

one discrete act of discrimination," rejecting defendant's "wooden application" of the statute of limitations). Because RICO is plainly a continuing violation statute, *see H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S 229 (1989), the broader "injury and pattern discovery" accrual rule is appropriate.

The "injury and pattern discovery" accrual also is necessary to avoid anomalous and indefensible results. The most astounding outcome under the "injury discovery" accrual rule adopted by the court of appeals is that, where the two predicate acts are more than four years apart, a plaintiff's RICO action can be barred by the statute of limitations before her RICO cause of action ever existed. In fact, the "injury discovery" rule would enforce a de facto shortening of the statute of limitations in virtually every case, since the potential plaintiff would "lose" the time until the second predicate act takes place. In addition, the victim of a "closed-ended scheme" would suffer a constricted limitations period since courts have generally required at least one year of racketeering activity in such circumstances. *See Religious Technology Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992). The RICO plaintiff has a difficult burden, often having to discover a cause of action that does not exist until years after the plaintiff's injury and having to discover wrongs perpetrated against other victims. The "injury and pattern discovery" accrual rule takes this into account and allows the injured party sufficient time to investigate, discover, and prepare her RICO claim.

ARGUMENT

I. PLAINTIFF'S PRE-EXISTING DEBT HAS NOT YET BEEN AFFECTED BY THE DEFENDANTS' RICO ACTIVITY AND THUS NO RICO ACTION COULD ACCRUE

A. Plaintiff Must Suffer Concrete Injury To Business Or Property To Bring A Civil RICO Action

A RICO cause of action cannot exist without an injury to the plaintiff. This Court has made clear that, for purposes of civil RICO, a plaintiff only has standing to bring a claim once she "has been injured in [her] business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). This "injury to business or property" requirement has been characterized by the courts as a need to show a "concrete financial loss." *See, e.g., Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1310 (9th Cir. 1992) (citing *Fleischhauer v. Feltner*, 879 F.2d 1290, 1299-1301 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990)), *cert. denied*, 507 U.S. 1004 (1993). In the absence of such a loss, a RICO claim is not ripe for adjudication.

The concrete RICO injury has not yet occurred in the instant case. As a result of her divorce proceedings, Joanne gave up her community property interest in Vincent's medical practice in return for regular property settlement payments. In addition, she was to receive alimony payments from Vincent. These debts predated the RICO activity of the defendants, who embarked on an illegal plan to defeat Vincent's legal debts to Joanne without losing control of the valuable assets owned by Vincent. The fraudulent reorganization of the medical practice and the fraudulent bankruptcy filings were the predicate acts designed to achieve the ultimate financial goal: the legal discharge of Vincent's debts without a diminution or loss of his substantial financial assets, *i.e.*, the medical practice. The scheme also aimed to

increase the value to the defendants of the medical practice by fraudulently defeating the ownership rights of Dr. Heeren.

Only if Joanne is compelled to accept less than 100% of her pre-existing debts at the conclusion of the bankruptcy proceeding and the discharge of Vincent's debt, will she have suffered an "injury to business or property." Yet, since the bankruptcy proceedings are not finally concluded, and since the bankruptcy trustee is still pursuing assets of the estate, it is as yet uncertain whether Joanne will be forced to accept less than 100% of her pre-existing property settlement debt. There still may be substantial recovery in bankruptcy of the fraudulently transferred assets which will then be used to repay creditors, including Joanne.

The mere filing of Vincent's bankruptcy petition did not injure the plaintiff. A bankruptcy petition, in actuality, has little legal effect with respect to a creditor's ability eventually to recover a debt. A bankruptcy petition, which acts as an "order of relief,"

> does not give the debtor relief as such. Instead, it sets the stage for the debtor to get relief at other points in that bankruptcy, such as discharge. These other points are separate proceedings, for the most part wholly independent of the order for relief.

1 GINSBERG & MARTIN ON BANKRUPTCY § 2.02[E] (4th ed. 1996). Even a fraudulent bankruptcy petition, which is dismissed without the discharge of any debts whatsoever, does not result in an actionable injury to the creditors. *See Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993).

A final bankruptcy discharge, on the other hand, has substantial legal effect. A discharge "voids any judgment at any time obtained . . . " and "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt as a

personal liability of the debtor," among other things. 11 U.S.C. § 524(a)(1)&(2) (1994). It was obtaining the final discharge in bankruptcy which was the goal of Vincent's unlawful scheme to defraud Joanne.

The filing of Vincent's bankruptcy petition did not ensure that a discharge would be obtained. The Bankruptcy Code explicitly provides that a discharge may be denied in situations where

> • the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred . . . or has permitted to be transferred . . . property of the debtor, within one year before the date of the filing of the petition . . . ;
>
> • the debtor has . . . falsified . . . any recorded information . . . from which the debtor's financial condition or business transactions might be ascertained . . . ; [or]
>
> • the debtor knowingly and fraudulently . . . made a false oath or account. . . .

11 U.S.C. § 727(a) (1994). If Vincent is eventually denied a discharge for any of these reasons, Joanne's debt owed by Vincent will survive in full unaffected by the bankruptcy proceedings.[10]

Thus, where a defendant, like Vincent Siragusa in the instant case, attempts to defeat a pre-existing debt by obtaining a discharge of the debt in bankruptcy court through a pattern of racketeering activity, the moment of injury is, by

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[10] Moreover, until the bankruptcy case is closed, Vincent could choose to "reaffirm" his financial obligation to Joanne Siragusa. The Bankruptcy Code provides that a debtor may enter into a legal and enforceable reaffirmation agreement with a creditor. *See* 11 U.S.C. § 524(c)-(d) (1994). In such a situation, Joanne would have been made whole notwithstanding a discharge of Vincent's debts.

definition, the final discharge of the defendant's legal obligation to pay the debt. The racketeering activity may be completed, but the RICO injury may not occur unless or until a discharge is granted. The existence of the RICO injury is contingent on a future event.

Where the defendants' conduct in violation of the statute has already occurred but the plaintiff has not yet been injured, a cause of action has not yet accrued. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). Thus, in the context of an antitrust conspiracy, this Court has ruled that the cause of action accrues from the date the plaintiff "feels the adverse impact of" the violation, *id.* at 339, and that future damages "that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative. . . . " *Id.* In circumstances involving future damages for past conduct, this Court has held that "the cause of action . . . will accrue only on the date [damages] are suffered." *Id.*

The ruling in *Zenith* was applied to an attempt to obtain a fraudulent discharge of debt in bankruptcy by the Second Circuit in *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988). There, the defendants were attempting to obtain a bankruptcy discharge of a corporation's lawfully incurred debts. After fraudulently transferring substantial assets out of the corporation, the defendants presented a bankruptcy plan whereby the creditors, including Bankers Trust, would receive only 17.5% of its debt with the remainder being legally discharged. *Id.* at 1105-06. At the time Bankers Trust filed its civil RICO case against the defendants, the bankruptcy trustee was attempting to recover the fraudulently transferred assets and a final discharge of debt had not become effective. *Id.* at 1099.

The Second Circuit dismissed that aspect of Bankers Trust's RICO claim seeking damages for loss of a legitimate debt due to defendants' bankruptcy fraud. The *Bankers Trust*

court reasoned that the pre-existing debt had not yet been finally discharged, and the trustee was attempting to recover the fraudulently transferred assets. If the trustee was successful in recovering the assets, the debt to Bankers Trust might be paid in full. *Id.* at 1106. If the trustee could not recover enough of the fraudulently transferred assets to pay off the pre-existing debt, only then would Bankers Trust incur an injury caused by the defendants' RICO activities.[11]

The analysis of the moment of injury in *Bankers Trust* is consistent with the statutory definition of the crime of bankruptcy fraud. Section 3284 of Title 18 makes clear that the crime culminates in the final discharge and that this is the date from which the limitations period begins to run:

> The concealment of assets of a debtor in a case under title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge.

18 U.S.C. § 3284 (1994). *See United States v. Blizzard*, 27 F.3d 100, 103 & n.5 (4th Cir. 1994); *United States v. Knoll*, 16 F.3d 1313, 1318 (2d Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 574 (1994); *United States v. Del Percio*, 870 F.2d 1090, 1096 (6th Cir. 1987); *see also United States v. Guglielmini*, 425 F.2d 439, 443 (2d Cir.) (statute applies similarly to non-debtor

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[11] *Cf. Barnett v. Stern*, 909 F.2d 973, 977 n.4 (7th Cir. 1990) (damage claims were "speculative (and premature)" because "it remains to be seen whether [plaintiffs] will be able to satisfy their claims from the bankruptcy estate"); *Hartford Life Insurance Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1173 (D.C. Cir. 1975) ("[t]he right to sue [under Loan Shark Act] did not accrue until the plaintiff had a cause of action," and, because plaintiff's cause of action "depended upon a prior adjudication of the rights of the trustee in bankruptcy," plaintiff's suit "was commenced well within the applicable limitations period").

defendant, *i.e.*, does not accrue as to non-debtor defendant until final discharge), *cert. denied*, 400 U.S. 820 (1970).

Thus, fraudulent *attempts* to defeat a pre-existing debt through bankruptcy fraud, whether those attempts are unsuccessful or unfinished, are simply insufficient to show injury actionable as a RICO claim. So long as RICO injury itself is "uncertain," the cause of action has not accrued. Here, defendants attempted to defeat Vincent Siragusa's pre-existing debt to Joanne by fraudulent bankruptcy filings and financial reorganizations. Until the conclusion of the bankruptcy, however, it is uncertain whether Joanne will suffer an injury and her cause of action has not accrued.

B. A Non-RICO Debt Becomes A RICO Injury Only When It Is "Lost," And Joanne Has Not Yet "Lost" Her Property Settlement Debt

The court of appeals identified Joanne's RICO injury as "the loss of her share of Vincent's medical practice interest." (Pet. App. 24a) The appeals court apparently refers to that aspect of the bankruptcy fraud by which the defendants attempted to hide Dr. Siragusa's assets by fraudulently transferring them to third parties. This characterization of Joanne's injury is inapt, however, because Joanne's underlying debt, based on the property settlement with Vincent and subsequent state court judgment, is unaffected by the attempted fraudulent transfers.

Vincent's fraudulent bankruptcy petition, purportedly indicating that ownership of his medical practice was transferred to others, does not in and of itself constitute an injury to Joanne. At most, these events reveal an attempt by the defendants to injure Joanne's security

interest that protected the pre-existing property settlement debt. Joanne released her one-half community property interest in Vincent's medical practice in return for periodic payments that were themselves protected by a security interest in Vincent's medical practice. But an attempt, even a successful attempt, to subvert an underlying security interest or insurance policy is not itself a RICO injury unless and until the debt that is being secured is "lost."

The First Circuit twice has looked at this situation and, each time, declined to find a RICO injury, citing *Bankers Trust* with approval in each case. In *Lincoln House, Inc. v. Dupre*, 903 F.2d 845 (1st Cir. 1990), the plaintiff had sued the defendant in state court for breach of contract damages. The plaintiff subsequently filed a civil RICO case alleging that the defendant was fraudulently transferring his property in an effort to become judgment-proof should there be damages in the state court proceeding. The court of appeals found that the plaintiff's RICO claim was not ripe for adjudication because the plaintiff's alleged RICO injury "is clearly contingent on events that may not occur as anticipated or may not occur at all." *Id.* at 847. Since the state court action had not been decided, and since no potential debt had been "lost" as yet, the "hypothetical inability to recover" was not the type of injury actionable under RICO.

The same result ended the plaintiff's attempt to pursue a civil RICO claim in *Bennett v. Centerpoint Bank*, No. 91-1603, 1991 U.S. App. LEXIS 32856 (1st Cir. Dec. 31, 1991). The plaintiff was the chairman of the board of a failed banking venture, and the defendants were, among others, his former board members. The plaintiff and the defendants had given personal guarantees for a corporate loan used to get the banking venture underway. The

plaintiff alleged, in essence, that the defendants fraudulently used corporate assets to enrich themselves personally and to obtain releases from their personal guarantees on the corporate loan. *Id.* at *7. His alleged RICO injury was exposure to suit for the banking venture's unpaid debt without the financial support of his co-guarantors of the corporate loan. Finding that "exposure does not equal injury," the First Circuit ruled that the injury was insufficient to maintain a civil RICO action. *Id.* at *17. The plaintiff had not yet been forced to cover *any* of the banking venture's debt, and even more to the point there was no evidence that he would have to pay more than he would have paid "if the defendants had never committed a predicate act. The injury, therefore, is speculative and the suit, at the very least, premature." *Id.* at *8 (citing *Bankers Trust, supra*).

Even the fraudulent reduction of the value of the collateral on non-recourse mortgage loans has been held not itself to result in an actionable RICO injury where the original mortgage debt was not yet "lost." In *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 728 (1995), the plaintiff lender alleged that the defendant mortgage broker fraudulently inflated the value of the properties pledged as collateral to secure non-recourse mortgages on those properties. The lender maintained that it had been injured by this scheme because the loans would not have been made but for the fraudulent inflation of value. The resulting loans were, as a consequence, undersecured, giving the lender an additional risk of loss. *Id.* at 768. The court found, however, that the lender had as yet suffered no RICO injury. It was insufficient for a civil RICO cause of action for the lender to claim that "it incurred additional risk of loss as a consequence of the fraud." *Id.*

Whether the lender suffered RICO injury could be determined only once there was a foreclosure on one of the affected properties and the collateral proved insufficient to pay the debt. *Id.* at 769.

Notably, the Ninth Circuit itself has recognized that a fraudulent attack on the underlying insurance against loss does not, in and of itself, constitute an actionable RICO injury. The defendant in *Berg v. First State Insurance*, 915 F.2d 460 (9th Cir. 1990), canceled without notice the liability policies of six Getty Oil directors. The cancellation took place when the defendant learned that the directors were potentially liable for billions of dollars in threatened shareholder derivative suits as a result of the Texaco/Pennzoil battle for control of Getty Oil. *Id.* at 462. The directors brought a civil RICO action against First State. Subsequently, Texaco paid all of the expenses of the directors in the derivative lawsuits, and First State sought dismissal of the RICO case on the grounds that the plaintiff had suffered no injury. The Ninth Circuit agreed, finding that the directors had "suffered no financial loss." *Id.* at 464. Though the insurance polices may have been fraudulently canceled, reasoned the court of appeals, the plaintiffs suffered no loss since their "claims" had been covered by other means.

The RICO scheme against Joanne's underlying security interest in the medical practices places her in a position akin to the lenders in *First Nationwide* and the directors of *First State*. The attempted fraudulent transfer of the medical practice by Vincent, even if ultimately successful, would not cause Joanne RICO injury unless any of her original property settlement debt is "lost." Only at the point where she must turn to the security to pay for the loss she has incurred and finds that that security is insufficient to cover the lost debt will she

suffer a RICO injury. Until that time, the effect of defendants' fraudulent scheme is speculative and premature. There is no conclusive evidence yet that the original debt will or will not be paid in full, and no indication that the defendants' RICO activities will result in any "lost debt." Indeed, there is no saying that Joanne will receive one cent less on her pre-RICO debt than "if the defendants had never committed a predicate act." *Bennett*, 1991 U.S. App. LEXIS 32856, at *8.

C. Because The Relief That Joanne Sought Through Her Bankruptcy Complaint – *i.e.*, Equitable Relief – Is Not Available To A Civil RICO Plaintiff, A RICO Claim Would Have Been Premature Prior To The Resolution Of The Bankruptcy Proceedings

The prematurity of Joanne's RICO claim at the time she filed her initial adversary proceeding complaint in bankruptcy court – at which time, according to the court of appeals, Joanne's RICO claim accrued, (Pet. App. 24a) – is further evidenced by the relief she sought in the bankruptcy complaint. Faced with an attempted fraudulent transfer and an effort to obtain discharge of her property settlement debt, Joanne principally sought equitable relief. To this end, she asked the bankruptcy court to:

1. Determine that the lien on the medical practice was senior and valid;
2. Declare the Sale and Transfer of the medical practice void and order rescission; and
3. Declare a Constructive Trust and compel debtor and others to transfer the medical practice and account for the proceeds.

(J.A. 187)

Her RICO complaint, if filed at the time the court of appeals ruled that her cause of action accrued, necessarily would have sought similar relief from the attempted fraudulent transfers. At that point, at the beginning rather than at the end of the bankruptcy, her monetary "damages" were unknown. The injury from the RICO activity of the defendants at that point could only have been addressed by seeking the equitable relief necessary to unravel the attempted fraudulent transfers, as indicated in her adversary complaint filed in Bankruptcy Court.

The court of appeals, however, has determined that equitable relief is unavailable to RICO plaintiffs such as Joanne pursuant to 18 U.S.C. § 1964(c). In *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), the Court reviewed the statute and the legislative history and concluded:

> The clear message from the legislative history is that, in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision.

Id. at 1086 (emphasis in original); *see also In re Fredeman Litigation*, 843 F.2d 821 (5th Cir. 1988) (following *Wollersheim*); 2 MATTHEWS, WEISSMAN & STURC, CIVIL RICO § 8.05, at 8-175 (2d ed. 1992) (noting that "the *Wollersheim/Fredeman* position has been adopted by a clear majority of the courts considering the issue.").[12]

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[12] The Ninth Circuit noted that the model for civil RICO, the Clayton Antitrust Act, contained an express provision for private injunctive relief whereas RICO was silent, creating a strong indicia of congressional intent against implying such relief under the Supreme Court's decisions governing implied rights of action. *Wollersheim*, 796 F.2d at 1088; *see also In re Fredeman Litigation, supra*.

In May 1989, Joanne sought the traditional equitable relief of a plaintiff faced with an attempt to hide assets from ultimate use to repay debts. At that point, the RICO activity had resulted only in the first step of the scheme: the filing of the bankruptcy petition and the corresponding fraudulent transfer of Vincent's valuable assets. The next step of the RICO activity, as it applied to Joanne, was to obtain the legal discharge of Vincent's substantial property settlement debt, or at least a substantial portion of that debt. The final step for the defendants was then to return the fraudulently transferred assets to Vincent, or at least to his control and use. By May 1989, while the first step had been accomplished, Joanne had not yet suffered any injury. At that time she was left with seeking principally equitable relief to undo the fraudulent attempts to transfer Vincent's assets and enjoining the future steps in the scheme which would, in fact, cause her "concrete financial loss."

Whether the RICO activity in this case ever leaves Joanne with a "lost debt" has yet to be determined. She may yet be paid her pre-RICO debts in full, either by the bankruptcy trustee or by Vincent. If she receives less than 100% of those pre-existing debts at the conclusion of the bankruptcy as a result of RICO activity, then she will have suffered a RICO injury. Until that point her cause of action has not yet accrued.

II. THE "INJURY AND PATTERN DISCOVERY" ACCRUAL RULE IS REQUIRED BY THE CIVIL RICO STATUTE AND BY GENERAL PRINCIPLES OF ACCRUAL

A. The Language, Structure And Policies Of The Civil RICO Statute Compel The "Injury And Pattern Discovery" Rule

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994), does not contain a specific provision directly addressing when the statute of limitations in a civil RICO action accrues. In the face of the statute's silence on this issue, some courts have ruled that the statute of limitations period runs when a plaintiff knows or should know of her injury.[13] This "injury discovery" accrual rule, however, does not comport with the language, structure and policies of the RICO statute. A careful analysis of RICO demonstrates that the four-year statute of limitations period[14] should not begin to run until the plaintiff knows or should have known both her injury *and* that her injury was the result

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[13] For purposes of this section, petitioners assume, *arguendo*, that they suffered an injury at the time of the bankruptcy filings in 1989. As set out in Part I above, petitioners contend that an injury to petitioners, if any, will not be suffered until the conclusion of the bankruptcy proceedings and, accordingly, there is no need to reach the issue of the proper accrual rule for civil RICO actions.

[14] In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), the Court held that all RICO claims were subject to a uniform four-year statute of limitations. The Court expressly declined to decide when this limitations period begins to run. *Id.* at 156-57.

of a pattern of racketeering (the "injury and pattern discovery" rule).[15]

"[T]he heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 154 (1987) (emphasis in original). This is evident from the very elements of a civil RICO claim. To prove a civil RICO cause of action, one must demonstrate (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity (known as "predicate acts"); (5) causing injury to

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[15] In their appeal to this Court, petitioners focus on the differences between the "injury discovery" rule followed by the Ninth Circuit below and the "injury and pattern discovery" rule that has been adopted by the Sixth, Eighth, Tenth and Eleventh Circuits. *See* Cert. Pet. at 7-8. In fact, courts have announced a variety of other accrual rules, *see Bingham v. Zolt*, 66 F.3d 553, 559 (2d Cir. 1995) (and cases cited therein), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1418 (1996), with the Third Circuit's "last predicate act" rule being the most prominent. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). The "last predicate act" rule provides that

> the limitations period for a civil RICO claim runs from the date the plaintiff knew or should have known that the elements of the civil RICO cause of action existed unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern.

Id. at 1130. Because petitioners' RICO action also would be timely under the "last predicate act" rule, petitioners do not address this Third Circuit test except to note that much of the reasoning in favor of the "last predicate act" rule applies equally to the "injury and pattern discovery" rule.

the plaintiff's "business or property." 18 U.S.C. §§ 1962(c), 1964(c) (1994); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). In creating the "pattern of racketeering" concept, RICO employed an entirely new approach to fighting the increasingly sophisticated threat posed by organized criminal activity. It is the "pattern of racketeering activity" concept, along with the private civil remedy provisions, which lies at the core of RICO and gives the statute utility as a weapon against organized criminal activity. Accordingly, discovery of the pattern of racketeering should be a necessary prerequisite for commencement of the running of the statute of limitations. *See* Paul B. O'Neill, *Mother of Mercy, Is This The Beginning of RICO? The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. Rev. 172, 234-42 (1990).

Section 1961(5) of RICO defines a "pattern of racketeering activity" as at least two predicate acts of racketeering activity, "the last of which occurred within ten years . . . after the commission of a prior act of racketeering." This statutory provision manifests Congress' desire to have courts accept evidence relating to the RICO predicate acts that is up to ten years in the past. "In selecting a term of ten years within which predicate acts could occur to establish the pattern requirement, Congress must have contemplated recovery for remote acts and even for remote injuries." *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991). In striking the balance between a defendant's desire for repose and for fresh evidence and a plaintiff's right to recover for past wrongs, the statute plainly anticipates that plaintiffs will be given extensive leeway to look to the past in seeking to obtain compensation for their injuries. The restrictive "injury discovery" accrual rule, therefore, conflicts with the clear intent of RICO to allow plaintiffs to go back at least ten years into

the past. As the Third Circuit concluded concerning the "injury discovery" rule:

> Congress in enacting the ten year limit must have envisioned causes of action which would involve patterns of racketeering extending over that period of time. It would be inconsistent with this breadth of definition for us to state that we will look to the past ten years to see if a civil RICO claim exists but if we find ten years of racketeering activity, all related and all perpetrated by the same defendants, we will provide a remedy only to those who were victimized within the past four years. To do so would encroach upon and limit a legislatively-enacted scheme to provide recovery for racketeering injuries. *See* 18 U.S.C. § 1961(5), 1964(c).

Keystone, 863 F.2d at 1132-33.

The very type of racketeering acts targeted by RICO also highlights the difficulties faced by a plaintiff in discovering the existence of a RICO cause of action. The predicate acts listed in 18 U.S.C. § 1961(1) include numerous fraud-related crimes: 18 U.S.C. § 664 (embezzlement from pension and welfare funds), 18 U.S.C. §§ 891-894 (extortionate credit transactions), 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud), 18 U.S.C. § 1954 (unlawful welfare fund payments). In practice, mail fraud, wire fraud, or securities fraud have been the most commonly pled of the predicate acts in RICO lawsuits. *See Agency Holding Corp.*, 483 U.S. at 149.[16] Fraud, by its very nature, is a crime of concealment and

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[16] *See* Report of the Ad Hoc Civil RICO Task Force of the American Bar Association Section on Corporations, Banking and Business Law at 57 (1985) (92% of civil RICO cases in which there had been a published decision relied upon mail, wire or securities fraud for their predicate acts).

deception. "Actual fraud, by definition, consists of any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another – something said, done or omitted with the design of perpetrating what is known to be a cheat or deception." *In re Eashai*, 87 F.3d 1082, 1089 (9th Cir. 1996); *see also Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996); *Hobson v. Wilson*, 737 F.2d 1, 33 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). The typical RICO claim demands that a plaintiff discover not one, but at least two predicate acts of fraud.[17]

In addition, potential plaintiffs face special problems in attempting to uncover a RICO fraud. RICO typically involves schemes taking place through the operation of legitimate enterprises. It was the infiltration, assumption of control, and operation of legitimate businesses and unions which Congress aimed at halting in enacting RICO. *See* S. Rep. No. 91-617, 91st Cong., 1st Sess. 76 (1969). *See also United States v. Turkette*, 452 U.S. 576, 591 (1981) ("the major purpose of Title IX . . . is to address the infiltration of legitimate business by organized crime"); 2 MATTHEWS, WEISSMAN & STURC, CIVIL RICO § 5.02, at 5-7 to 5-10 (2d ed. 1992) ("the predominant articulated goal of the statute was to protect legitimate businesses from infiltration by organized crime"). As was the case with attorney Patricia Brown and her law firm here, the fact that

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[17] Moreover, courts have interpreted the "continuity plus relationship" requirement to mean that plaintiffs must prove more than simply two predicate acts. *See, e.g., Northern Trust Bank v. Inryco, Inc.*, 615 F. Supp. 828, 830 n.5 (N.D. Ill. 1985) ("for RICO purposes two mailings do not a 'pattern' make"); *see also* DAVID SMITH & TERRANCE REED, CIVIL RICO § 4.04, at 4-27 to 4-76 (1992).

frauds are perpetrated by "respectable businesses" makes them especially tough to uncover.

Thus, a party faces a daunting task in discovering a RICO cause of action: before filing suit, a RICO plaintiff must root out multiple fraudulent acts and trace this fraudulent conduct to the operation of an apparently legitimate business enterprise. Because of its restrictive nature in starting the limitations period at the earliest possible moment, the "injury discovery" rule does not give proper weight to the challenge of uncovering such frauds. The "injury discovery" rule defeats the very purpose of the statute by not allowing a plaintiff sufficient time to piece together the RICO scheme. For this reason, the "injury and pattern discovery" rule is superior in that it recognizes the inherent problems that victims of fraud schemes face in developing a RICO claim and ties the accrual of the civil RICO action to discovery of the RICO pattern.

Moreover, given that RICO actions typically rely on fraud allegations, it is telling that "injury discovery" is *not* the accrual rule governing fraud cases. Under federal law generally, the statute of limitations on a fraud claim does not begin to run when the plaintiff reasonably learns of her injury; rather, the limitations period commences only after the plaintiff discovered or should have discovered the fraud itself. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) ("this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it.' ") (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.)

342, 348 (1875)); *La Porte Construction Company, Inc. v. Bayshore National Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *Briley v. State of California*, 564 F.2d. 849, 855 (9th Cir. 1977); *Hartford Life Insurance Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1174 (D.C. Cir. 1975); *see also* 54 C.J.S. *Limitations of Actions* § 192 at 250 (1987) ("General Principles. In equity and under various statutes, the statute of limitations in cases of fraud ordinarily runs from the time when the fraud is, or should be, discovered.") (and cases cited therein).

Since knowledge of injury alone is insufficient to begin accrual of the statute of limitations in a simple fraud lawsuit, it surely should not be enough for accrual of the larger, more complicated RICO fraud action. To allege a RICO action, the plaintiff must discover the whole "fraud," namely, the two underlying frauds which are part of a pattern and which are operating through legitimate enterprises. It is this pattern of wrongdoing that forms the basis of the RICO cause of action; hence, following the spirit and reasoning of the federal fraud accrual rule, the limitations period should begin to run only after this pattern of unlawful behavior is discovered by plaintiff. Yet, the "injury discovery" rule would require a more restrictive rule for a civil RICO case than for an ordinary federal fraud case. Consequently, adoption of the "injury discovery" rule could lead to the indefensible result whereby the statute of limitations would expire on the RICO claim (since the victim learns early on that she was injured) long before the limitations period even begins to run on the underlying fraud predicate act (since it may be a lengthy period of time before the plaintiff first learns that she was the victim of an intentional fraud, and not simply bad luck or negligence).

The drafters of RICO included a liberal construction clause to ensure that courts did not construe the statute's ambiguities too narrowly. RICO states that "The provisions of this title shall be liberally construed to effectuate its remedial purpose." Racketeer Influenced and Corrupt Organizations Act, ch. 96, § 904(a), 84 Stat. 947 (1970), note following 18 U.S.C. § 1961. "The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Sedima*, 473 U.S. at 498. The language of the statute, as well as "Congress' self-consciously expansive language and overall approach," mandate that RICO be read broadly. *Id.*; *see Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1555 n.11 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991); *Keystone*, 863 F.2d at 1128 & nn. 3-4 (and cases and articles cited therein). The cramped "injury discovery" accrual rule would not serve RICO's remedial purpose. Instead, it would diminish the recoveries available to the private attorneys general and prevent RICO from achieving its full remedial and policing potential. *Id.* at 1131-32. The "injury discovery" rule is therefore inconsistent with the liberal construction mandate and should be rejected.

This Court has recognized that the pattern and enterprise concepts embodied in the RICO statute represent a unique approach to combatting criminal activity that is "simply unknown to common law." *Agency Holding Corp.*, 483 U.S. at 150. Thus, a civil RICO cause of action requires a rule of accrual that is consistent with the presence of these unique elements. The "injury and pattern" rule is the only accrual rule that recognizes the central role played by the RICO pattern requirement.

B. General Principles Of Accrual Compel The Adoption Of The "Injury And Pattern Discovery" Rule

Proponents of the "injury discovery" rule fundamentally misconstrue federal accrual principles. The case law governing general principles of accrual plainly confirms the appropriateness of an "injury and pattern" discovery rule for civil RICO actions.

A leading decision of this Court on statute of limitations accrual is *United States v. Kubrick*, 444 U.S. 111 (1979). In *Kubrick*, the plaintiff filed suit under the Federal Tort Claims Act for hearing loss suffered as a result of his medical treatment at a Veterans Administration hospital. Although aware that he had suffered hearing loss due to his hospital treatment in 1969, Kubrick did not realize that he could bring a legal action against the United States for negligent treatment until 1972. When Kubrick filed suit in 1972, the United States moved to dismiss on statute of limitations grounds. The United States argued that the two-year limitations period had accrued in 1969 when Kubrick learned of the relevant facts relating to his claim. Kubrick opposed this motion, contending that accrual should not occur until he discovered the legal significance of these underlying facts.

The Supreme Court rejected Kubrick's argument that the statute of limitations should not begin to run until a plaintiff discovers a legal theory for recovery. In finding for the United States, however, the Court did *not* adopt an "injury discovery" rule. Instead, the Court held that a claim accrues "when the plaintiff knows *both* the existence *and the cause* of his injury." *Id.* at 113 (emphasis added). In 1969, Kubrick had discovered the "factual predicate for a claim against the VA." *Id.* at 118. At that

time, Kubrick knew far more than that he had been hurt – he knew the "critical facts" relating to his injury and "who ha[d] inflicted the injury." *Id.* at 122. Therefore, the statute of limitations began to run in 1969 since that was when "Kubrick was aware of his injury and its probable cause." *Id.* at 118.

Given the unique structure of RICO, knowing the "cause" of the RICO injury involves discovering that defendants were operating an enterprise through a pattern of racketeering. The pattern of racketeering *is* the "factual predicate" of a RICO claim. Thus, Joanne Siragusa did not know the "factual predicate" of her RICO claim until Dr. Heeren came forward in December 1990. Until that time, Joanne Siragusa had only limited knowledge of her husband's acts against her. Prior to December 1990, she did not know that the source of her injury was defendant Patricia Brown and her law firm. She also did not discover until December 1990 that her injury was caused by an enterprise operating through a pattern of racketeering and that this pattern of illegal activity had other victims. While Joanne was aware of her injury (assuming, *arguendo*, that she suffered any injury, *see* Part I *supra*) prior to December 1990, it was not until the affidavit of Dr. Heeren that she learned the "causation" of her RICO claim, consistent with *Kubrick*.

In determining the point of accrual for federal causes of action, other courts also have required more than mere knowledge of injury. Consistent with *Kubrick*, courts have required that the plaintiff "have knowledge of the factual predicate of his claim" as well as the role of the defendants. *Lavellee v. Listi*, 611 F.2d 1129, 1131-32 (5th Cir. 1980); *see also Outman v. United States*, 890 F.2d 1050, 1052 (9th Cir. 1989) (plaintiff had been "personally aware of the 'factual predicate' of his claim"); *Nicolazzo v. United*

States, 786 F.2d 454, 456 (1st Cir. 1986) (plaintiff had not learned "the factual predicate" for his claim); *Harrison v. United States*, 708 F.2d 1023, 1027 (5th Cir. 1983) (plaintiff must have knowledge of "factual predicate"); *Santana v. United States*, 693 F. Supp. 1309, 1312 (D.P.R. 1988) ("factual predicate" must have become apparent, *i.e.*, plaintiff must be "armed with facts about the harm done to him to place him on notice").

Following the teachings of *Kubrick*, federal courts also have found that the limitations period does not commence until the plaintiff has knowledge of who caused the injury.

> The general federal rule is that the statute [of limitations] does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights. Plaintiffs must know or have reason to know that they were injured, *and must be aware or should be aware of who inflicted the injury.*

Rozar v. Mullis, 85 F.3d 556, 561-62 (11th Cir. 1996) (citations and quotations omitted; emphasis added). *See also Nasim v. Warden, Maryland House of Correction*, 64 F.3d 951, 955 (4th Cir. 1995) ("[F]or a cause of action to accrue, it is critical that the plaintiff know that he has been hurt and who inflicted the injury."), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1273 (1996); *Goodhand v. United States*, 40 F.3d 209, 212 (7th Cir. 1994) ("Until the plaintiff knows that he has been injured and by whom or by what, he has no reason to take steps to determine whether he might have a legal claim."); *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987) ("Nor will a Section 1983 action accrue until the plaintiff is aware or should have been aware who has inflicted the injury."); *Stewart v. Parish of Jefferson*, 951 F.2d 681, 684 (5th Cir.) ("The statute of limitations period

commences once the plaintiff acquires possession of two critical facts: (1) an injury has occurred; and (2) the identify of the person who inflicted the injury."), *cert. denied*, 506 U.S. 820 (1992). Thus, these precedents also support a requirement that, before the statute begins to run, a RICO plaintiff must discover more than her injury; for accrual of the statute of limitations, she also should reasonably be aware of the identity of the defendant and the predicate acts that form the pattern of racketeering activity. Joanne Siragusa was not aware of either of these key facts until Dr. Heeren came forward in December 1990.

As discussed above, *supra* at 31-32, the federal accrual rule for fraud actions also is not "injury discovery" alone. It is discovery of the fraud, and not the injury, which is key in federal fraud actions: "the statute of limitations would not start to run in a fraud case until the fraud was exposed, even if the defendant had made no effort to conceal it beyond what is implicit in committing fraud. . . ." *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 851 (7th Cir. 1996); *see supra* at 31-32. A comparable rule in the RICO context would require that the limitations period begin to run only after the plaintiff has discovered the basis of the RICO violation, *i.e.*, the pattern of predicate acts constituting the RICO offense.

This Court's treatment of "continuing violations" – *i.e.*, where defendant engages in a series of wrongful acts – also argues powerfully for the "injury and pattern discovery" accrual rule. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), defendant had engaged in five separate incidents of discrimination in violation of the Fair Housing Act, but only one of the wrongful acts was within the limitations period. The *Havens Realty* Court concluded that all five incidents should be deemed timely because they constituted a "continuing violation" with at

least one of the wrongful acts within the limitations period.

> [A] "continuing violation" of the Fair Housing Act should be treated differently from one discrete act of discrimination. . . . Petitioners' wooden application of [the statute of limitations provision], which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act. Like the Court of Appeals, we therefore conclude that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely.

Id. at 380-81 (citations and footnote omitted). Federal courts also have applied an expansive view of accrual for continuing violations in connection with other statutes. *See Fowkes v. Pennsylvania Railroad Co.*, 264 F.2d 397, 399 (3d Cir. 1959) (Federal Employer's Liability Act; "postponing of the running of the statute of limitations . . . in . . . situations involving continuing or frequently repeated wrongs"); *Held v. Gulf Oil Co.*, 684 F.2d 427, 430 (6th Cir. 1982) (Title VII; suit timely where pattern of discriminatory acts continues into the limitation period, even though discriminatory acts commenced prior to limitation period); *Acha v. Beame*, 570 F.2d 57, 65 (2d Cir. 1978) (same).

With its requirement of the commission of at least two related predicate acts, RICO is, by its terms, a continuing violation statute.[18] This Court has stressed that a RICO plaintiff must prove continuity as part of a RICO

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[18] "[I]t is the continuing nature of the violation that is the very essence of a RICO claim." *Cook County v. Berger*, 648 F. Supp. 433, 434 n.1 (N.D. Ill. 1986).

action. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240-42 (1989). To establish a pattern of racketeering activity, plaintiffs must show that the defendant committed at least two predicate acts that amount to, or threaten, continued criminal activity. *Id.* In addition, RICO, like the Fair Housing Act, embodies a "broad remedial intent" on the part of Congress. Consequently, *Havens Realty* and the federal accrual rule for "continuing violations" are directly relevant to civil RICO. Just as this general rule for "continuing violations" considers the early wrongful acts that are part of a continued violation to be within the applicable limitations period, the continuity aspect of a RICO violation should be reflected by having the statute of limitations only begin to run on earlier predicate acts when the plaintiff reasonably discovers the existence of the pattern of racketeering activity. A more restrictive accrual rule would be a "wooden" application of the statute of limitations and should be rejected.[19]

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[19] Although the Court borrowed RICO's four-year statute of limitations from antitrust law, *Agency Holding Corp.*, 483 U.S. at 152-53, antitrust accrual is based on the idea that an antitrust violation is a discrete act. Antitrust law has no discovery rule, *see, e.g., Harold Friedman Inc. v. Thorofare Markets Inc.*, 587 F.2d 127, 138 n.41 (3d Cir. 1978), even though a discovery rule ensures that the limitations period does not begin to run before a plaintiff can reasonably be expected to discover some or all of her claim. Discovery rules have been implied in virtually all other federal causes of action, *see, e.g., Aparicio v. Norfolk & Western Railway Co.*, 84 F.3d 803, 814-15 (6th Cir. 1996) (Federal Employer's Liability Act); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994) (Title VII of the Civil Rights Act of 1964), and are especially important for RICO given the complex frauds and corruption which serve as the basis for RICO actions. *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 152-54 (8th Cir. 1991). "Every court that has considered an accrual rule for civil RICO has adopted some sort of discovery

In their discussions of accrual principles, courts often appear to use the discovery of the injury as a shorthand. In doing so, these courts implicitly assume in their opinions that the plaintiff also learned of the "causation of the injury" or the facts of the fraud at the same time that she learned of the injury itself. To the extent that the "injury discovery" rule takes into account the fact that it is a "RICO injury" which is being discovered, the differences between the two rules may be largely semantic. "Conceptually there is no requisite RICO 'injury' until the damage impacting the plaintiff becomes part of a pattern of racketeering activity. Prior to that point there is no *RICO* injury and the statute of limitations may not begin to accrue." *Keystone*, 863 F.2d at 1131. When a plaintiff has discovered or should have discovered her "RICO injury" – that is, that she suffered an injury which was part of a pattern of at least two related predicate acts – the statute of limitations should begin to run. However, a potential plaintiff has yet to discover her "RICO injury" when she knows only that she has suffered some injury, but has no notion of who caused the injury, has no knowledge that it was an illegal act, and has no idea that there were other victims of the same or a related fraudulent scheme. It would be premature and grossly unfair for the limitations period to run on a complicated, important cause of action

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rule." *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992). There can be no dispute that, in light of the absence of the discovery principle, the antitrust accrual rules are inapplicable in the RICO context. *See, e.g., Granite Falls Bank*, 924 F.2d at 152-53 (setting out reasons why antitrust analogy is inapposite for civil RICO accrual); *cf. Sedima*, 473 U.S. at 485-86 (rejecting antitrust analogy in construing the injury requirement under § 1964(c) for standing to sue for a civil RICO action).

such as RICO based on a plaintiff's limited knowledge that she has suffered an injury of some sort.

C. An "Injury And Pattern Discovery" Accrual Rule Would Avoid Anomalous And Inappropriate Results

As demonstrated above, the "injury and pattern discovery" rule best fits the language and structure of RICO and the established federal law accrual principles. In addition, the "injury and pattern discovery" rule avoids the inappropriate and indefensible outcomes which can arise when the "injury discovery" rule is applied in the RICO context.

The most astounding outcome under the "injury discovery" accrual rule is that a plaintiff's RICO claim can be barred by the statute of limitations before her RICO cause of action ever existed. The loss of a RICO claim before it ever exists takes place in instances where the second predicate act occurs more than four years after the first predicate act. Where the plaintiff is the victim of the first predicate act and learns of her injury at the time of commission, the "injury discovery" rule would have the statute of limitations begin to run immediately. Under that rule, the limitations period will expire four years from the date of the first predicate act. Yet the pattern requirement set out in RICO provides that two predicate acts occurring any time within a ten-year period form the basis of a RICO pattern. 18 U.S.C. § 1961(5) (1994). Therefore, the RICO cause of action cannot exist until the second predicate act occurs. Yet if the second predicate act takes place more than four years after the first predicate act (the statute anticipates up to ten years between the first and second predicate acts), then the "injury

discovery" rule would preclude the victim of the first predicate act from bringing suit to recover for her injury. In these circumstances, the party injured by the first predicate act is barred from bringing suit before she ever had an opportunity to sue.

Depriving a potential plaintiff of her right to sue even before a cause of action ever came into being plainly violates all accepted principles of accrual. *See, e.g., United States v. Lindsay*, 346 U.S. 568, 569 (1954) ("In common parlance a right accrues when it comes into existence . . . "); *Amy v. Dubuque*, 98 U.S. 470, 476 (1878) (a cause of action only accrues when a right to sue attaches); *Wilcox v. Executors of Kemp Plummer*, 29 U.S. (4 Pet.) 172 (1830) (same). Furthermore, such a result cannot be reconciled with the very purpose of the RICO statute. *See Keystone*, 863 F.2d at 1134 ("Under the [injury] discovery rule if a plaintiff suffers a single injury as a result of a predicate act but the second predicate act which establishes the necessary 'pattern' occurs five years after the injury to the plaintiff, that plaintiff's claim is barred by the four year civil RICO statute of limitations. . . . In such cases the purpose of the statute is defeated by the simple discovery rule"); Paul B. O'Neill, *Mother of Mercy, Is This the Beginning of RICO? The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. Rev. 172, 235 (1990) ("To initiate the statutory period sooner [than all the elements exist] is potentially to restrict the plaintiff's cause of action in a way unauthorized by the statute and inconsistent with general principles of statutes of limitation"); Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 Minn. L. Rev. 827, 879 (1987) ("Because a potential plaintiff has not been injured under RICO until the pattern element has been satisfied,

it is inappropriate to start the limitations period before the pattern is fully developed.").

Having the limitations period expire before the cause of action even exists is, on its face, absurd. Yet, this is the logical result of the "injury discovery" rule. Although this extreme outcome may not arise frequently, it underscores the harsh reality of the "injury discovery" rule. Under this "injury discovery" rule, the victim of the first predicate act does not have the four-year statute of limitations established by this Court in *Agency Holding Corp., supra*. Rather, the first injured party "loses" from her four year limitations period the entire time period from her injury until the second predicate act occurs. In other words, the limitations period is really four years minus this "lost" amount of time during which a cause of action does not yet exist and, indeed, might never exist without occurrence of a second predicate act.

For example, assume that victim A is injured by a predicate act in 1990 and is aware of her injury at the time that it occurs. Assume that the second predicate act in the pattern takes place in 1993 against victim B. Under the "injury discovery" rule, the statute of limitations period began to run in 1990 and expired in 1994. Yet, no RICO cause of action existed until the second predicate act took place in 1993. Thus, under the "injury discovery" rule, victim A did not enjoy the benefit of the four-year limitations period established by this Court in *Agency Holding Corp*. Instead, victim A has only one year: before the statute expires in 1994, victim A must uncover the second, 1993 fraud, ascertain whether it meets the pattern, continuity and other requirements of RICO, satisfy her Rule 11 obligations, and draft and file a RICO complaint that pleads her allegations with particularity pursuant to

Fed. R. Civ. P. 9(b).[20] This de facto shortening of the statute of limitations would occur in virtually every case under the "injury discovery" rule. Thus, a judicially created accrual rule would be allowed to rewrite RICO's four-year statute of limitations by fiat.

The "injury discovery" rule also would create a constricted limitations period because of the RICO continuity requirement. Courts have imposed a greater stringency on this continuity requirement in light of *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). In cases involving a "closed-ended scheme," courts have generally held that the minimum duration necessary to satisfy the continuity requirement is over one year. *See Religious Technology Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992) (court could find no case in which continuity requirement was held to be satisfied by a pattern of racketeering activity lasting less than one year); *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 609-11 (3d Cir. 1991), *cert. denied*, 504 U.S. 955 (1992) (12 months found to be insufficient period to demonstrate continuity in closed-ended scheme). By the time a true pattern of racketeering activity could be discovered, much of the four-year limitations period would have already run, leaving potential plaintiffs with insufficient time to investigate adequately the typically complex facts involved in a RICO case and prepare a proper complaint.

Some courts, including the court below, have suggested that this fundamental flaw in the "injury discovery" accrual rule – *i.e.*, the limitations period beginning to run before the cause of action exists, so that plaintiff is

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[20] The underlying predicate acts of fraud must be pleaded with particularity under Fed. R. Civ. P. 9(b). *See, e.g., Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 196 (9th Cir. 1987).

deprived of some or all of the four year limitations period – can be patched up using some form of tolling doctrine. *See* Pet. App. 11a; *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992); *Rodriguez v. Banco Cent.*, 917 F.2d 664, 667-68 (1st Cir. 1990). These courts would espouse some sort of Rube Goldberg-esque conglomeration of "injury discovery" rule plus tolling doctrines to prevent anomalous results. No one, however, has outlined how this tolling would work or which of the assorted tolling principles would come into play.[21] This approach would add a whole layer of complexity to the question of civil RICO accrual, thereby defeating the goal of uniformity and predictability which this Court sought to achieve in *Agency Holding Corp.*, 483 U.S. at 154. The result of using some hybrid "injury discovery plus tolling" rule would be to "virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter." *Id.*[22]

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[21] In fact, this is a distortion of the very concept of tolling. Tolling assumes that a cause of action exists and that the statute of limitations would ordinarily accrue. *See, e.g., Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1490 (D.C. Cir. 1989).

[22] Some courts of appeals decisions also have attempted to use a "separate accrual" concept to compensate for the "injury discovery" rule's problems. *See, e.g., State Farm Mut. Auto Ins. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring). The "separate accrual" rule, however, was designed to address older predicate acts which cause a new and independent injury within the limitations period. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1103 (1988), *cert. denied*, 490 U.S. 1007 (1989). The "separate accrual" rule is plainly inapplicable to facts, such as the instant case, which involve two predicate acts with different victims, and this rule apparently does not permit a plaintiff to recover for injuries suffered more than four years before. Furthermore, the "separate accrual" rule shares many of the same deficiencies as the use of tolling doctrines to cure the

In the case of a simple, non-RICO tort action, an "injury discovery" rule has an obvious utility. With these simpler claims, the injury was the last act establishing the claim and invariably put the victim on notice of her potential cause of action. In the case of RICO, however, the injury caused by the first predicate act does not establish the last element necessary for the cause of action; it will be some period of time in the future, when the second predicate act occurs, that all the elements of the RICO cause of action are satisfied. As a consequence of this unique quality of a RICO action, the burden that the "injury discovery" rule seeks to place on the victim of the first predicate act is unprecedented in American law. In the typical tort case, the tort exists at the time that the party is injured and the victim need only to go out and investigate to discover her claim. Yet, the victim of the first predicate act in a RICO case has a very different chore. She cannot simply go out and discover those facts underlying her claim since her cause of action does not exist. Instead, the RICO plaintiff must remain vigilant for up to ten years in the future, seeking to discover a second predicate act that would signal a RICO cause of action. This is a far more onerous burden than that imposed on the ordinary tort victim or any other plaintiff and argues for the more expansive accrual rule provided by the "injury and pattern discovery" standard.

The restrictive "injury discovery" rule also does not take into account that, unlike the ordinary cause of action, the RICO action may be based on predicate acts

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"injury discovery" rule's infirmities: the result is a complicated, hard to administer accrual regime which will lack the uniformity and predictability this Court called for in *Agency Holding Corp.* The "injury and pattern discovery" rule largely removes the need for the "separate accrual" doctrine.

inflicted on persons other than the plaintiff. The RICO plaintiff, therefore, may be required to search for a second predicate act, usually involving fraud, that possibly has an entirely different victim. In fact, under the "injury discovery" rule, the injured party would be expected to learn of this second fraud even before the second victim ever learned of the fraud or was aware that he was injured. Thus, Joanne Siragusa would be responsible for learning of the fraud against Dr. Heeren, even though she had no reason to suspect that he had been defrauded until Dr. Heeren came forward in December 1990. This further obstacle faced by the plaintiff seeking to discover a RICO action, once again, militates heavily against the restrictive "injury discovery" rule and in favor of the "injury and pattern discovery" rule.

The "injury discovery" rule is plagued by the fundamental problem that is present with any civil RICO accrual rule that focuses solely on knowledge of injury without regard to knowledge of pattern: knowledge of injury does not necessarily provide *any* notice of the existence of a RICO action. A plaintiff who has discovered her injury may have absolutely no reason to be aware of subsequent predicate acts committed by the same perpetrators, especially where, as in the case at bar, those acts were directed at defrauding someone other than herself. *See, e.g., Granite Falls Bank v. Henrikson*, 924 F.2d 150 (8th Cir. 1990) (plaintiff was a bank that discovered in 1985 that it had been defrauded, but did not discover until January 1989, in the course of litigation, that the defendant in the underlying action had been involved in a pattern of racketeering activity). Having the statute of limitations run before a plaintiff can reasonably be expected to discover the pattern of racketeering activity is unfair to plaintiffs and unduly limits their ability to

file meritorious RICO claims to obtain compensation for their injuries. *See Urie v. Thompson*, 337 U.S. 163, 170 (1949) (rejecting notion that cause of action should accrue and bar suit where plaintiff was in "blameless ignorance" and without "notice of the invasion of [his] legal rights"). By contrast, the "injury and pattern discovery" rule recognizes the inherent difficulties that an injured party must overcome in order to discover that her injury was caused by a pattern of racketeering activity. The limitations period in a civil RICO claim ought not in fairness begin to run until the victim discovers or should have discovered the existence of this pattern of unlawful conduct.

Because the narrow "injury discovery" rule starts the limitations period running before a pattern can be discovered, this rule will likely have the effect of forcing injured parties to file RICO lawsuits prematurely. Faced with the possible expiration of the limitations period, plaintiffs can be expected to file "protective lawsuits" before they have been able to investigate fully the RICO claim. With the statute of limitations running, injured parties will not be able to wait until a pattern of predicate acts emerges. Instead, plaintiffs' counsel may resort to gerrymandering single scheme RICO complaints or otherwise filing weak cases in the hope that they will eventually discover the pattern. The "injury and pattern discovery" rule is far preferable since it allows an injured party sufficient time to see if a RICO pattern develops and to investigate adequately her potential claims.[23]

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[23] In this case, Joanne Siragusa filed her RICO action a few months after it became clear that her adversary complaint in bankruptcy against Brown and the law firm would be dismissed on jurisdictional grounds. Joanne was not a knowledgeable plaintiff sitting on her rights; she has been actively pursuing her claim since first learning of Brown's role in masterminding the fraudulent schemes. The "injury and pattern discovery" rule provides no comfort for the knowledgeable plaintiff. *Cf. Rodriguez v. Banco Cent.*, 917 F.2d 664, 667 (1st Cir. 1990) (criticizing "last predicate act" rule for allowing knowledgeable plaintiff to delay filing suit, but expressing sympathy toward a "pattern discovery"-type test which was not at issue before it). Under the "injury and pattern discovery" rule, a knowledgeable RICO plaintiff loses her claim if she delays since the statute of limitations begins to run as soon as the injured plaintiff learns of the racketeering activity. The "injury and pattern discovery" rule also ensures against the lazy plaintiff: if the injured party is not diligent in her efforts to discover the pattern, she will be deemed to have constructive knowledge and her claims will be barred as outside the limitations period. *See, e.g., Klehr v. A.O. Smith Corp.*, 87 F.3d 231 (8th Cir. 1996); *Association of Commonwealth Claimants v. Moylan*, 71 F.3d 1398 (8th Cir. 1995).

There can be no principled justification for adhering to a rule that permits the limitations period to expire before a pattern of racketeering has developed or where a plaintiff could not reasonably be expected to discover that it existed. This Court rejected an accrual rule which would begin the limitations period running at a time when the facts supporting plaintiff's action were "unknown and inherently unknowable." *Urie v. Thompson*, 337 U.S. at 169-70. Instead, the Court fashioned the discovery rule doctrine because it did not believe that the plaintiff should lose his right to recovery because of his "blameless ignorance" of the fact of his injury. *Id.* These basic principles of fairness should continue to guide the Court in determining the accrual rule for civil RICO actions. Joanne Siragusa should not be held to an "injury discovery" standard which requires her to discover facts which are "unknown and unknowable." In the context of RICO, the "injury and pattern discovery" rule

is the only accrual rule that provides an injured party with a fair opportunity to discover her RICO claim and to vindicate her interests under the statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In The

Supreme Court of the United States

October Term, 1996

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA, and JOANNE SIRAGUSA,

Petitioners,

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., and BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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SUMMARY OF ARGUMENT

The first question presented is:

Whether a civil RICO action accrues prior to the conclusion of the bankruptcy proceedings where the defendants' unlawful scheme is based on fraudulently obtaining a discharge of a pre-existing debt and where plaintiff may suffer no injury until the final discharge in bankruptcy.

This question is moot and, indeed, the entire case is moot because Joanne and the trustee have settled with Vincent, and one of the terms of settlement is the revocation of the discharge in bankruptcy.

The second question presented is:

Whether a civil RICO action accrues when the plaintiff knows or should know that she has been injured, even though she does not know that her injury was part of a pattern of racketeering activity or that defendants caused her injury.

The injury discovery rule affords four years for the injured person to discover any pattern that may exist and the identity of the defendants. This rule encourages and rewards diligence and prevents injustice which can result from stale claims, faded memories and lost evidence.

The pattern discovery rule could result in a 14-year statute of limitations. *Rodriguez v. Banco Central*, 917 F.2d 664, 667 (1st Cir. 1990) (if the last predicate act of the pattern is committed ten years from the date of the first predicate act and the four-year statute of limitations starts to run at that time). This cannot be reconciled with this Court's determination that there was a need for a

uniform statute of limitations lest the memory of witnesses fade or evidence be lost. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987).

ARGUMENT

I.

THE CASE IS MOOT

It is the duty of all counsel to call to the Court's attention facts which might conceivably indicate that the case has been rendered moot. This action is necessary so that the Court may not unknowingly exercise its authority in cases in which it no longer has jurisdiction. *Board of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238 (1985).[1]

Respondent Beckley, Singleton, DeLanoy, Jemison & List, Chtd. ("Beckley") suggests that in June 1994 Tom Grimmett, as Trustee for the Bankruptcy Estate of Vincent Siragusa, and Joanne Siragusa ("Joanne") settled with Vincent Siragusa ("Vincent" or "Dr. Siragusa"). One of the terms of this settlement was the revocation of the discharge in bankruptcy of Vincent. *See*, section 7(E)(2) of the settlement documents attached to the affidavit of George Foley, Jr. App. 21.

[1] Similarly, where there is no actual case or controversy, the parties may not have sufficient interest in the dispute to raise such arguments as would assist the court in resolving the issue supposedly presented.

That this fact renders the action moot is seen from two concessions made in Petitioners' brief. There, Joanne first abandons her principal claim for damages, *i.e.*, for interference with her lien rights. She now claims only her "marital payments." She then concedes that she has not been injured and will not be injured unless Vincent is granted a final discharge in bankruptcy. Brief for Petitioners at 10.

As the bankruptcy court has revoked Vincent's discharge, she cannot have been injured. Under Joanne's own analysis, this case is moot.

A. JOANNE HAS ABANDONED THE CLAIM FOR DAMAGES BASED UPON INTERFERENCE WITH HER LIEN RIGHTS

Joanne brought a RICO claim for $6 million in current damages for impairment of her lien rights. (Joanne's complaint, paragraph 101, part B; Joint Appendix at 70.) Liens constitute property. *See, Matagorda County v. Russell Law*, 19 F.3d 215 (5th Cir. 1994). Accordingly, she brought a RICO claim as a "person injured in his business or property. . . . " 18 U.S.C. § 1964(c).

Joanne has now abandoned this claim, however. Her present claim is only for the marital payments. Joanne apparently now recognizes that her claim of $6 million in damages to her lien claims was untenable.

Indeed, basing a RICO claim upon the dispute involving this divorcing couple was untenable, as the facts reveal. Vincent was a partner in three entities. Heart Institute Property ("HIP") was a partnership which

owned the medical building in which Vincent and others practiced. Vincent had an interest of 27.55%. *See*, Joint Appendix at 27. Heart Institute Cath Lab ("HICL") was a partnership of Drs. Siragusa, Bowers and Heeren in which each owned one-third. This partnership owned the personal property utilized in the practice of medicine. *See*, Joint Appendix at 26. Heart Institute of Nevada ("HIN") was the vehicle used for the actual practice of medicine. *See*, Joint Appendix at 25. The assets of this partnership were the accounts receivable and personal good will of each doctor consisting of their individual patient following. Each doctor had a one-third interest in this partnership.

Vincent transferred his interest in HIP and HICL to Drs. Bowers and Heeren. Joint Appendix at 26, 27. Joanne was compensated for her liens by the payment of $1.4 million by Dr. Bowers. This case focused on HIN.

Vincent's interest in HIN had two very different values. For purposes of divorce in calculating alimony and community property values, a doctor's personal good will has a value. *Ford v. Ford*, 105 Nev. 672, 679, 782 P.2d 1304, 1309 (Nev. 1989). Vincent's good will would have great value because of his great earning capacity. *See*, Joint Appendix at 30.

However, a doctor's personal good will is not an asset in bankruptcy. The doctor retains his personal good will in bankruptcy free and clear of the claims of a creditor. *In re Cooley*, 87 B.R. 432 (Bkrtcy. S.D. Tex. 1988); *In re Molina Y Vedia*, 150 B.R. 393 (S.D. Tex. 1992). For this

reason the bankruptcy estate was smaller than the community property estate. Joanne's lien on HIN would only attach to the accounts receivable.

Vincent then entered into an employment contract with Cardiology Associates of Nevada ("CAN"), a new corporation formed by Drs. Bowers and Heeren.

Joanne, however, was dismayed to see that Vincent was earning as much money as an employee of CAN as he had earned as a partner in HIN. *See*, Joint Appendix at 203. There is no reason why Vincent should not earn the same amount. He brought to CAN the same good will, services and patient following that he had brought to the HIN partnership. These assets were free and clear of the claims of the trustee in bankruptcy. Joanne asserted the novel theory that, if she had been allowed to foreclose against HIN, she could have operated the medical partnership and generated $6 million in profits. Joanne's complaint, paragraph 101, part B; Joint Appendix at 70.

Joanne has now abandoned any such claims.

B. THE CLAIM FOR MARITAL PAYMENTS IS MOOT

Joanne's only remaining claim is for "marital payments."[2] The RICO theory of liability is based on the assumption that Joanne's debt was lost by a discharge of that liability obtained through bankruptcy fraud. Joanne explains that a necessary prerequisite to RICO liability is the final discharge of Vincent. Brief for Petitioners at 10. Because of the settlement agreement, this cannot occur.

On September 23, 1983, the Nevada state court entered a decree of divorce which incorporated Vincent and Joanne's property settlement agreement. The facts stated in this and in the following two paragraphs come from *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807 (Nev. 1992). That agreement provided that Vincent would make alimony payments of $3,000 per month for 60 consecutive months, commencing August 19, 1983. The agreement also provided that Vincent would purchase Joanne's community property interest in Vincent's medical practice for the sum of $1,250,000, to be paid over 15 years in increasing monthly installments.

By mid-1987, however, Vincent had fallen into default on both the alimony and property settlement obligations. On November 5, 1987, the Nevada state court

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[2] All that remains is her claim for the first item of damage alleged by Joanne:

> A. The failure to receive the Marital Payments and all other rights and interests to which Joanne was properly entitled under the Decree of Divorce.

[Joint Appendix at 70.]

orally announced it would enter judgment in favor of Joanne in the amount of $1,300,000 in property settlement arrearages. Vincent petitioned for bankruptcy protection, seeking a discharge from the property settlement obligation.

On August 31, 1990, Joanne filed a petition in Nevada state court to modify the alimony provisions of the parties' divorce decree. Although Vincent had paid all of the alimony due under the original decree, the court awarded new alimony of $7,500 per month to compensate Joanne for the discharged property settlement obligation of $1.3 million. This order was affirmed by the Nevada Supreme Court, *Siragusa v. Siragusa, supra.*

By the time the bankruptcy court approved the settlement in August 1994, Joanne had received $1.4 million for her lien claims, which Joanne acknowledges is an offset. Joint Appendix at 70. Joanne would also have received alimony (to compensate her for the loss of community property division) at the rate of $7,500 a month from August 1990 to August 1994 in the amount of $360,000. Joanne would also receive $160,000 in the settlement agreement. Settlement agreement at section 7(C)(2). Joanne also received all Vincent's residual rights in the bankruptcy estate. Settlement agreement at section 7D. If this does not fully compensate Joanne, it would not be because Vincent obtained a final discharge in bankruptcy, but rather because Vincent was in poor health and had limited financial resources to pay his obligations. Settlement Agreement at section J. App. 12-13.

For these reasons, the Court should set aside the decree below and remand the cause with directions to

dismiss. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

II.

BRIEF ON THE MERITS

A. THE ACTION ACCRUED MORE THAN FOUR YEARS PRIOR TO THE FILING OF THE COMPLAINT

Analyzing Joanne's complaint is an arduous task. Joanne utilized a pleading style which has been condemned by two circuits. In *Hartz v. Friedman*, 919 F.2d 469, 471(7th Cir. 1990), the court indicated that it might well have dismissed the plaintiff's complaint on the ground that it was an egregious violation of Rule 8(a) of the Federal Rules of Civil Procedure in that the complaint contained 125 pages, including a mass of detail which might have been relevant at an appropriate trial but which was clearly surplusage in stating a claim. The court noted that the volume and form of the pleading made it difficult to sort out the necessary elements of a RICO claim.

A similar pleading was condemned by the court in *Pelletier v. Zwiefel*, 921 F.2d 1465, 1517-18 (11th Cir. 1991). In that case the court concluded that the manner in which plaintiff pleaded his case buttressed the court's conclusion that the suit was brought purely to harass the defendants. The court noted that the pleading style required the court to sift through the facts presented and decide for themselves which were material to the particular cause of action, a difficult and laborious task. On page 1522 the court concluded that the plaintiff had utilized

the complaint to "shake down his opponent" with the expenses of defending a RICO charge to extort a settlement.

After reviewing Joanne's complaint, the court made two conclusions:

First, Joanne knew of her injury in May 1989 when she filed her adversary complaint in the bankruptcy court.

Second, four years before the filing of the present action in November 1993, the pattern existed although Joanne did not know of the existence of the pattern until December 1990.

The pattern existed more than four years prior to the filing of the complaint in November 1993. This fact is shown by Joanne's complaint at 180-81 in the Joint Appendix. There, Joanne alleges that Pat Brown utilized telephone and mail service to accomplish the fraud involved in the Heeren stock sale over the period May 29, 1987 to October 27, 1989.

In the Joint Appendix at 180 Joanne asserts that Pat Brown utilized the mail services as described in Exhibit 2 which asserts that mail fraud was utilized from June 29, 1987 to March 3, 1988. Joint Appendix at 159. Also, on page 180 of the Joint Appendix, Joanne relies upon interstate telephone calls described in Exhibit 3. These calls were described in Joint Appendix at 160 and occurred at various times in 1987 and 1988.

The latest time referred to in the complaint regarding the Heeren stock sale fraud was October 27, 1989. Joint Appendix at 182. Thus, it appears that the requisite pattern existed no later than October 27, 1987 and that more than four years elapsed before the filing of the complaint in November 1993.

Petitioners and *amici* assert that the Ninth Circuit rule is illogical because the statute of limitations can run before the cause of action accrues. This is not the Ninth Circuit rule. The court made this clear in *Grimmett v. Brown*, 75 F.3d 506, 512 (9th Cir. 1996). There the court stated that a RICO cause of action cannot accrue until all the elements exist and the statute of limitations cannot begin to tick until a pattern exists. The pattern consisted of many predicate acts involving the claimed bankruptcy fraud and the claimed Heeren stock sale, which existed over the period of 1987 through 1989.

B. THE "INJURY DISCOVERY" RULE BETTER SERVES THE INTERESTS BEHIND BOTH THE RICO ACT AND STATUTES OF LIMITATIONS

The injury discovery rule is consistent with the purpose behind statutes of limitation. Statutes of limitations promote justice by prompting litigants to be diligent. As claims grow old, evidence is lost, witnesses disappear, and recollections fade. *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). The court's own fact-finding process is hobbled. Defendants face revived claims from which exculpatory

evidence is more difficult to accumulate.[3] Thus, a statute of limitations promotes a common moral sense that valid claims should be brought quickly. Establishing a time bar for stale claims reduces the risk of false claims, which increase in number as the facts at issue become more remote. *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390 (1886). Outdated cases also place a heavy burden on the court system. *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965). Simply put, a statute of limitations limits the time period in which a plaintiff may bring his cause of action. Thus, statutes of limitation prompt plaintiffs to be diligent in bringing their claims.

Requiring plaintiffs to be diligent in discovering the pattern will also serve the purpose of RICO. The "declared purpose" of Congress in enacting the RICO statute was "to seek the eradication of organized crime in the United States." *United States v. Turkette*, 452 U.S. 576, 589 (1981).[4]

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[3] Facing potential liability unsettles defendants and disrupts the orderly operation of society and the flow of commerce. *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975).

[4] Organized crime had been infiltrating and taking control of legitimate businesses to siphon billions of dollars out of the economy through corrupt means. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922 (1970) (Statement of Findings and Purpose). In an effort to remedy the growing problems caused by organized crime, Congress enacted the Racketeer Influenced and Corrupt Organizations Act (the "Act"). *See* 18 U.S.C. §§ 1961-1968 (1994).

The civil RICO section of the Act had three main purposes: (1) to afford victims of organized crime some opportunity at compensation for their injuries (2) to deter future organized

The crime organizations always have pattern and continuity. They are engaged in the business of crime. This "comes almost by definition." *Hindes v. Castle*, 937 F.2d 868, 874 (3d Cir. 1991). The pattern is there, the plaintiff must find the proof. Congress has commissioned the injured plaintiff as a private attorney general or, more accurately, as a bounty hunter to bring civil actions to eradicate organized crime. The bounty offered is not a gift. It must be earned.

Those injured by organized crime are encouraged to investigate and discover RICO violations. An injured plaintiff who is diligent will file a common law tort action to vindicate his injury.

If the injury was committed by an organized crime family and the plaintiff fails to discover the pattern within the four years allowed, the plaintiff has simply failed to earn the bounty. If the injury was committed by an ordinary criminal who had not yet attained the status of a statutory racketeer under RICO, then the statute of limitations may bar a RICO action. However, no violence is done to the Congressional plan. The ordinary criminal was not the target of the Act and is only an incidental player. *See*, the legislative history reported by Justice

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crimes and (3) to undermine the social and economic power of organized crime. *See* Organized Crime Control: Hearing before Subcomm. No. 5 of the Comm. on the Judiciary, House of Representatives, 91st Cong., 2nd Sess. 520 (1970). To accomplish these objectives, Congress equipped the Act with a treble damages remedy, forfeiture of assets for criminal violations of RICO provisions, nationwide service of process, expedition of actions, and a civil investigative demand. *See* 18 U.S.C. §§ 1963, 1964(c), 1965(b)-(d), 1966, 1968 (1994).

Powell in his dissent in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 525 (1985). The ordinary criminal will still be liable for the common law tort for which punitive damages may be assessed. When the ordinary criminal commits enough predicate acts to become a statutory racketeer, the person then injured by his action may rely upon the past predicate acts to obtain a RICO recovery.

The adoption of the injury and pattern discovery rule, in contrast, would allow a plaintiff, even though he is aware of the injury and the predicate act which caused it, to slumber on his rights without investigating whether the defendant has committed a pattern of racketeering activity. Such an interpretation does not serve the purposes of the RICO Act, and it makes for an inappropriate statute of limitations.[5] In *Rodriguez v. Banco Central*, 917 F.2d 664, 667 (1st Cir. 1990), the court noted that the pattern discovery rule could result in a 14-year statute of limitations and observed that such a rule would be difficult to reconcile with this Court's determination that there was a need for a uniform statute of limitations for civil RICO lest the memories of witnesses fade or evidence be lost. *Agency Holding Corp. v. Malley-Duff Associates, Inc.*, 483 U.S. at 156, quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

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[5] This analysis demonstrates petitioners' misplaced reliance on *United States v. Kubrick*, 444 U.S. 111 (1979). There, the Court held that a Federal Tort Claim Act cause of action accrues "when the plaintiff knows both the existence and the cause of his injury." That is the situation here. By May 1989, Siragusa knew of both her injury and the predicate act which caused the injury.

Adoption of the injury discovery rule will also assist in preventing the civil RICO action from being used outside its intended purposes. It is an unfortunate reality that organized crime accounts for only 9% of RICO cases. *See Sedima, supra,* 473 U.S. at 506. The Act's incentives – treble damages, attorney's fees, nationwide service of process, expedition of actions and a civil investigative demand[6] – make it alluring to any plaintiff. RICO charges are also often brought to harass defendants and extort a settlement from them. *Pelletier v. Zwiefel, supra,* 921 F.2d at 1517. This Court also has noted the potential for extortion. *Sedima, supra,* at 473 U.S. 506.

CONCLUSION

The settlement between Joanne, the trustee and Vincent has made the present action moot because the parties have stipulated to revoke Vincent's discharge in bankruptcy. Accordingly, the case should be dismissed as moot.

[6] *See* 18 U.S.C. §§ 1963, 1964(c), 1965(b)-(d), 1966, 1968 (1994).

The injury discovery rule encourages diligence and protects against injustice from faded memories and lost evidence and is the appropriate rule.

Respectfully submitted,

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No. 95-1723

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA AND JOANNE SIRAGUSA, Petitioners

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., AND BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD., Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AFFIDAVIT OF GEORGE FOLEY, JR.

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Affiant, George Foley, Jr. being first duly sworn, deposes and states on his own personal knowledge of facts as follows:

1. Affiant was counsel for Respondent BECKLEY, SINGLETON, JEMISON & LIST, CHTD., in the United States Bankruptcy Court for the District of Nevada, adversary proceeding, Case No. S-89-0068, also number S-89-2068.

2. Affiant attempted to review the above entitled Adversary Proceeding file at the Office of the Bankruptcy

Court Clerk in Las Vegas, Nevada for purposes of obtaining certified copies of the documents attached hereto. Affiant was informed by the Clerk that the above file has been closed and the file has been sent to the Bankruptcy Court's archives facility. The original file cannot be retrieved in time to obtain certified copies to attach to Respondent's Brief.

3. As counsel for BECKLEY, SINGLETON, JEMISON & LIST, Affiant was served in said adversary proceeding with a copy of MOTION FOR APPROVAL OF COMPROMISE AND SETTLEMENT AGREEMENT AND GOOD FAITH DETERMINATION WITH DEBTOR DEFENDANTS; AND SUPPORTING POINTS AND AUTHORITIES, a true and correct copy of which is attached hereto as Exhibit "A". Affiant certifies that Exhibit "A" is a true and correct copy of the actual document that was served on Affiant in said action and which is contained in Affiant's file in the above case.

4. As counsel for BECKLEY, SINGLETON, JEMISON & LIST, Affiant was served in said adversary proceeding with a copy of ORDER GRANTING MOTION FOR APPROVAL OF COMPROMISE AND SETTLEMENT AGREEMENT AND MAKING GOOD FAITH DETERMINATION WITH DEBTOR DEFENDANTS ONLY, a true and correct copy of which is attached hereto as Exhibit "B". Affiant certifies that Exhibit "B" is a true and correct copy of the actual document that was served on Affiant in said action and which is contained in Affiant's file in the above case.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ George W. Foley
GEORGE W. FOLEY, JR.

SUBSCRIBED AND SWORN to before me
this 11 day of October, 1996.

/s/ Dineen M. Bergsing
NOTARY PUBLIC

[SEAL]
OFFICIAL SEAL
DINEEN M. BERGSING
Notary Public, State of Nevada
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EXHIBIT "A"

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

In re: VINCENT SIRAGUSA, Debtor.	)	BK-S-87-3085-LBR Chapter 7
JOANNE M. SIRAGUSA individually and ex rel TOM GRIMMETT, Trustee, Plaintiff, v. VINCENT SIRAGUSA; et al, Defendants. And Related Counter And Crossclaims	)	ADVERSARY PROCEEDING NO. S-89-0068

TOM GRIMMETT, Trustee of the Bankruptcy Estate of VINCENT SIRAGUSA, Plaintiff, v. JOHN BOWERS; et al, Defendants.	)	ADVERSARY PROCEEDING NO. S-90-0216

MOTION FOR APPROVAL OF COMPROMISE AND SETTLEMENT AGREEMENT AND GOOD FAITH DETERMINATION WITH DEBTOR DEFENDANTS ONLY; AND SUPPORTING POINTS AND AUTHORITIES

Hearing Date: August 12, 1994
Hearing Time: 9:30 am

Trustee Tom Grimmett, Joanne M. Siragusa, debtor and V. Siragusa MD Chtd move this court for (i) approval of a compromise and settlement agreement between the trustee and Joanne M. Siragusa on one hand and debtor and V. Siragusa MD Chtd only (collectively the "Debtor Defendants") on the other hand and (ii) a determination that this compromise and settlement agreement is in "good faith". This motion is based on the supporting points and authorities, the arguments of counsel to be presented at the hearing hereon, and the entire record herein.

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SUPPORTING POINTS AND AUTHORITIES

The trustee and Joanne M. Siragusa have filed the above captioned adversary proceedings herein against the Debtor Defendants and various others (the "remaining Defendants") based on various claims for relief as set forth more fully in the pleadings filed therein. Joanne M. Siragusa also has various other marital claims against the

debtor which are the subject of proceedings in various other courts.

After first giving due consideration to the respective positions of the parties, the uncertainties and expenses of the Adversary Proceedings, the benefits of this Agreement to the parties, and, in the case of the trustee and Joanne M. Siragusa, the potential ability to obtain the rest of the damages to which the trustee and Joanne Siragusa believe they are properly entitled for the actions which are the subject of the Adversary Proceedings from the Remaining Defendants and others, the trustee and Joanne M. Siragusa have agreed to compromise and settle their respective claims with the Debtor Defendants only on the terms set forth in the Settlement Agreement and Mutual Release attached as Exhibit "A", subject to the approval and determinations by this court set forth in Section 8 thereof. The basic monetary terms of this settlement and compromise are that the Debtor Defendants will (i) pay the trustee and Joanne M. Siragusa $200,000 in cash, though the full Agreement should be consulted for the precise and complete terms.

The trustee and Joanne M. Siragusa believe that this compromise and settlement are in the best interests of this estate and that this court should grant:

1. The requested approval pursuant to Bankruptcy court rule 9019 based upon the overall facts and circumstances of this case with which this court is familiar.

2. The requested "good faith" determination that:

A. The Releases do not discharge or in any manner impair the Plaintiffs' claims for relief in the

Adversary Proceedings, or any other claims, against the Remaining Defendants.

B. The Releases discharge the Settling Defendants from contribution to any of the Remaining Defendants, and the Dismissed Defendants, based upon the following authorities:

C. NRS 17.245 and *Velsicol Chemical Corp., v. Davidson*, 811 P2d 561 (Nev, 1991) broadly construing the trial court's discretion to make a good faith determination under that statute.

D. *Avery v. US*, 829 F2d 817 (9th Cir, 1987) which holds that release of one joint tortfeasor does not release the others absent an agreement to that effect.

E. *First Fed S&L v. Oppenheim, et al*, 631 F Supp 1029 (SDNY, 1986) whose rationale would make Nevada the proper state contribution law to apply.

F. *Wieboldt Stores, Inc. v. Schottenstein*, 111 BR 162 (ND Ill, 1990) which holds that there are no express or implied rights to contribution in bankruptcy fraudulent conveyance actions.

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SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (the "Agreement") is made by and among the following parties with respect to the following underlying facts:

The Parties

A. (a) Tom Grimmett as the trustee (the "Trustee") in the Chapter 7 bankruptcy case for Vincent Siragusa as debtor (the "Debtor") filed in the United States Bankruptcy Court for the District of Nevada as Case Number BK-S-87-3085-LBR (the "Bankruptcy"), (b) Vincent Siragusa, MD, Ltd, a Nevada corporation wholly owned by Trustee ("Vincent Ltd"), and (c) Joanne M. Siragusa, individually and ex rel the Trustee in Adversary Proceeding Number 89-0068 ("Joanne") as one party (collectively "Plaintiffs"); and

B. (a) Vincent Siragusa ("Vincent") and (b) V. Siragusa, MD, Chartered ("Vincent Chtd") ("HICL") (jointly and severally as among themselves the "Settling Defendants") as another party; and

The Underlying Facts

C. On August 19, 1983, Joanne and Vincent as spouses entered into a Property Settlement Agreement which was subsequently incorporated and merged into a Decree of Divorce entered by the Nevada Eighth Judicial District Court in Case No. D58232 (the "Divorce Proceedings") on September 23, 1983. This Agreement and Decree were subsequently amended by various stipulations of the parties through January 1987.

D. On November 10, 1987, Vincent filed his Bankruptcy.

E. Joanne has since filed and amended a proof of claim against the Bankruptcy Estate in the Bankruptcy (the "Proof of Claim").

F. The Trustee (in his own such capacity and as the owner of Vincent Siragusa, MD, Ltd) and Joanne have also since filed certain claims in the following adversary proceedings in the Bankruptcy (collectively the "Adversary Proceedings") against the Settling Defendants herein and various others (the "Dismissed Defendants" and the "Remaining Defendants"):

1. Adversary Proceeding Numbers 89-0068 and 90-0216.

2. The Dismissed Defendants: (a) John A. Bowers ("Bowers"), (b) Heart Institute of Nevada, a Nevada joint venture ("HIN") formerly dba Cardiology Associates of Nevada, (c) Cardiology Associates of Nevada, Bowers, McMahon, More, Steljes, Thomas, and Uhl, Ltd., a Nevada corporation dba Heart Institute of Nevada (and the successor to Cardiology Associates of Nevada, Bowers, More, Thomas, and Uhl, MD's, Ltd. and also Cardiology Associates of Nevada, John A. Bowers, MD, Ltd.) ("CAN"), (d) Heart Institute Property, a Nevada partnership ("HIP") and (e) Heart Institute Cath Lab, a Nevada sole proprietorship of John A. Bowers (and the successor to Heart Institute Cath Lab, a Nevada partnership).

3. The Remaining Defendants: (i) Patricia L. Brown, (ii) Patricia L. Brown, Limited, (ii) Beckley, Singleton, DeLancy, Jemison, & List, Chtd., (iii) Paul Heeren, (iv) Paul Heeren, MD, Ltd, (v) their respective associates, employees, shareholders, heirs, successors or assigns, and (vi) any additional persons and entities which may subsequently be specifically named as "Does" in the Adversary Proceedings (other than the Settling Defendants).

G. Joanne has also since moved in the Divorce Proceedings to modify the alimony provisions of the Divorce Decree and reduce Vincent's alimony obligation arrearages thereunder to judgment, which has resulted in a significantly increased set of alimony obligations for Vincent (the "Modified Alimony Obligations").

H. Vincent has appealed from the Modified Alimony Obligations, including appeals which are still pending (i) in the Nevada Supreme Court as Case No. 22043 and (ii) in the Ninth Circuit Court of Appeals as Docket No. 91-16788 (collectively the "Alimony Appeals").

I. The Trustee and Joanne have filed RICO and other claims against certain of the Remaining Defendants, but not the Settling Defendants, in Nevada state and federal district courts (collectively, together with any other cases involving these same matters, the "Rico Actions").

J. Vincent has warranted and represented to Plaintiffs that he (Vincent) currently is in poor health and has limited financial resources and capabilities with which to satisfy his Modified Alimony Obligations and any other

obligations which may arise out of any of the above described litigation against him.

K. The parties wish to:

1. Fully, finally and completely resolve and settle in good faith as between themselves any and all matters and disputes, whether known or unknown and whether matured or unmatured, relating to or raised by the facts alleged or the matters referred to in the Proof of Claim and the various pleadings and papers filed by the parties in the Adversary Proceedings, the Divorce Proceedings (including the Modified Alimony Obligations), the Alimony Appeals, the Rico Actions, or otherwise.

2. Expressly reserve any and all such other matters and disputes which each may have or purport to have against the Remaining Defendants and the Bankruptcy Estate.

Accordingly, in consideration of the mutual promises contained herein, the parties hereby agree as follows:

1. The foregoing recitals are herein incorporated by reference.

2. Each party enters into this Agreement with the intention of binding such party and that party's various heirs, successors, assigns, attorneys, agents and all others who may claim under, through or in connection with that party (all of which are sometimes collectively referred to as the "related persons and entities" of that party) to, and agrees to:

A. Comply with each and all of the entering party's Express Obligations hereunder as well as the

Additional Provisions and other provisions contained herein; and

B. Accept compliance by each other party hereunder with each and all of that other party's Express Obligations and the Additional Provisions hereunder in full, final and complete satisfaction of any and all obligations which might otherwise exist from that obligated party.

3. Neither the execution nor the performance of this Agreement by any party shall constitute or be deemed to be an admission of:

A. Any liability, wrongdoing or impropriety on the part of that party, or any lack of merit in the claims or defenses of that party. Rather, such execution and performance are intended to in good faith compromise and fully, finally and completely resolve and settle the matters and disputes which are the subject of this Agreement. Without limiting the generality of the foregoing:

(1) With respect to Vincent, such execution and performance, and any Court Approval and Court Determination, of this Agreement shall not (i) constitute an admission or finding of any fraud or other wrongdoing or (ii) be used by anyone, including without limitation the Plaintiffs and the Remaining Defendants, in any judicial proceeding to support any such admission or finding.

(2) With respect to Joanne, such execution and performance, and any Court Approval and Court Determination, of this Agreement shall not (i) constitute an admission or finding of any lack of fraud or other

wrongdoing or (ii) be used by anyone, including without limitation the Settling and Remaining Defendants, in any judicial proceeding to support any such admission or finding.

B. The adequacy of the consideration provided for herein to fully compensate the Trustee (in his own such capacity and as the owner of Vincent Siragusa, MD, Ltd) and Joanne for any or all such matters and disputes, including without limitation their various claims for relief in the Adversary Proceedings, the Rico Actions, and Joanne's Proof of Claim. However, while Plaintiffs believe and contend that the consideration provided for herein is not adequate to fully compensate Plaintiffs for all of the damages to which Plaintiffs are properly entitled under the Adversary Proceedings, the Rico Actions, and Joanne's Proof of Claim, the parties have entered into this Agreement in good faith under the Nevada Contribution among Joint Tortfeasors Act and other comparable applicable law after first giving due consideration to the respective positions of the parties, the uncertainties and expenses of the litigation involving them, the benefits of this Agreement to the parties, and, in the case of Plaintiffs, the potential ability to obtain the rest of the damages to which Plaintiffs are properly entitled from the Remaining Defendants and others.

C. Any intention by any party to in any manner resolve, settle, release, discharge or impair to any extent any or all matters and disputes which each may have or purport to have against the Remaining Defendants and any others who are not parties to this Agreement. To the

contrary, each party expressly reserves any and all matters and disputes which each may have or purport to have against the Remaining Defendants and such others.

4. Plaintiffs, and each of them, expressly forever release and discharge (the "Releases") the Settling Defendants, and each of them, together with their respective related persons and entities, (but not the Remaining Defendants or any others) from any and all claims, causes of action, demands, judgments and executions under the laws of any jurisdiction, state or federal, which Plaintiffs, or any of them, have ever had, or now have, or may have, whether known or unknown and whether matured or unmatured, or that anyone claiming through or under Plaintiffs, or any of them, may have, or claim to have, against the Settling Defendants, and each of them, and their respective related persons and entities, including without limitation any claims or issues relating to or raised by the facts alleged or the matters referred to in the various pleadings and papers filed by the parties in the Adversary Proceedings, the Divorce Proceedings (including the Modified Alimony Obligations), the Alimony Appeals, the Rico Actions, or otherwise (collectively the "Claims"); provided that:

A. The Releases shall extend and operate with respect to any and all potential Claims by Plaintiffs, and each of them, against all present and prior attorneys, accountants and other advisors for the Settling Defendants, and each of them, except that the Releases shall not extend to or operate in favor of, or be, in any manner or to any extent, deemed to extend to or operate in favor of: (i) Patricia L. Brown, (ii) Patricia L. Brown, Limited, (iii) Beckley, Singleton, DeLanoy, Jemison, & List, Chtd., or

(iv) their respective associates, employees, shareholders, heirs, successors or assigns.

B. The Releases by Joanne shall not extend or operate with respect to any claims by Joanne against the Bankruptcy Estate, including without limitation Joanne's Proof of Claim, all of which such claims by Joanne shall survive against the Bankruptcy Estate.

C. The Express Obligations created by, and the Additional Provisions of, this Agreement shall survive the Releases.

5. The Settling Defendants, and each of them, expressly forever release and discharge (the "Releases") Plaintiffs, and each of them, (but not the Remaining Defendants or any others) together with their respective related persons and entities, from any and all claims, causes of action, demands, judgments and executions under the laws of any jurisdiction, state or federal, which the Settling Defendants, or any of them, have ever had, or now have, or may have, whether known or unknown and whether matured or unmatured, or that anyone claiming through or under the Settling Defendants, or any of them, may have, or claim to have, against Plaintiffs, and each of them, and their respective related persons and entities, including without limitation any claims or issues relating to or raised by the facts alleged or the matters referred to in the various pleadings and papers filed by the parties in the Adversary Proceedings, the Divorce Proceedings (including the Modified Alimony Obligations), the Alimony Appeals, the Rico Actions, or otherwise (collectively the "Claims"); provided that:

A. The Releases shall extend and operate with respect to any and all potential Claims by the Settling Defendants, and each of them, against all present and prior attorneys, accountants and other advisors for Plaintiffs, and each of them, except that the Releases shall not extend to or operate in favor of, or be, in any manner or to any extent, deemed to extend to or operate in favor of: (i) Patricia L. Brown, (ii) Patricia L. Brown, Limited, (iii) Beckley, Singleton, DeLanoy, Jemison, & List, Chtd., or (iv) their respective associates, employees, shareholders, heirs, successors or assigns.

B. The Express Obligations created by, and the Additional Provisions of, this Agreement shall survive the Releases.

6. Each party hereby waives for that party (and that party's related persons and entities) any and all rights under the provisions of Section 1542 of the California Civil Code, and of any similar rule of law adopted by statute or otherwise in the State of Nevada, and acknowledges that such party is familiar with, has been advised by such counsel as such party desires regarding the significance of, and understands the provisions of Section 1542 which provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

7. The Express Obligations of the parties hereunder are:

A. Each party shall indemnify and hold harmless each other party (and the related persons and entities of each such other party) from any and all claims, demands, liabilities, harm or loss (including without limitation attorneys fees and costs) arising out of or in connection with the breach by that party of the following warranties and representations (the "Warranties and Representations") which shall survive the execution and performance of this Agreement:

(1) Each party warrants and represents that such party has not heretofore assigned or transferred (or purported to have assigned or transferred), and that such party will not hereafter assign or transfer (or purport to assign or transfer), to any other person or entity any of the Claims Released hereunder.

(2) Each party has the full and complete authority to enter into and perform such party's obligations under this Agreement.

(3) The above incorporated recitals concerning Vincent's currently impaired physical and financial condition.

B. Each party agrees to (i) cooperate in promptly requesting the Court Approval and Court Determination described herein and (ii) upon such Court Approval and Court Determination becoming Final as described herein, shall forthwith fully and completely comply with and perform the following additional Express Obligations as applicable to that party.

C. The Settling Defendants shall promptly pay $200,000 as follows (the "Settlement Payments"):

(1) $40,000 to the Trustee for the benefit of the Bankruptcy Estate towards its claims in the Adversary Proceedings.

(2) $160,000 to Joanne towards Vincent's Alimony Obligations which shall have not accrued by the date the Court Approval and Court Determination become Final. Neither this $160,000 payment to Joanne, nor any Release nor anything else contained in this Agreement, shall be deemed to in any manner forgive or offset any of Vincent's Alimony Obligations payments which shall have accrued by the date the Court Approval and Court Determination become Final. To the contrary, Vincent shall also be obligated to pay to Joanne all of Vincent's Alimony Obligations payments which shall have accrued by the date the Court Approval and Court Determination become Final in addition to this $160,000 payment to Joanne.

D. Vincent shall execute and deliver to Joanne an irrevocable assignment of all of Vincent's right, title and interest as debtor to receive any and all distributions from his Bankruptcy Estate, including without limitation the debtor's rights to receive any distributions under Bankruptcy Code Section 726(a)(6) (the "Residual Assignment") in the form attached as Exhibit "1".

E. Each party shall dismiss with prejudice each and all of its respective Claims against each other in the Adversary Proceedings, The Divorce Proceedings (including the modified Alimony Obligations, the Alimony Appeals, the Rico Actions, or otherwise (the "Dismissals"); provided that:

(1) The Dismissals shall be joined in by each party to each such case as applicable (with each such party to bear its own fees and costs) so that all defenses and appeals as well as affirmative claims shall be dismissed, including without limitation the benefits of any judgments, orders or decrees which may otherwise result up to the filing of all such Dismissals; provided further that nothing in this Agreement shall be deemed to in any manner forgive or offset any of Vincent's Alimony Obligations payments which shall have accrued by the date the Court Approval and Court Determination become Final.

(2) The Dismissal in Adversary Proceeding Number 89-0068 shall include a stipulation by Vincent allowing the Discharge Revocation relief requested by Plaintiffs and be in the form attached as Exhibit "2".

(3) The Dismissal in the Divorce Proceedings shall include a permanent waiver by Joanne of the right to create and/or enforce any further Alimony Obligations against Vincent (the "Alimony Waiver") and be in the form attached as Exhibit "3"; provided further that nothing in this Agreement shall be deemed to in any manner forgive or offset any of Vincent's Alimony Obligations payments which shall have accrued by the date the Court Approval and Court Determination become Final. In the event the Nevada Eighth Judicial District Court shall subsequently fail to approve the stipulated Dismissal, including the Alimony Waiver, in the form attached or in another form sufficient to fully terminate all of Vincent's Alimony Obligations after the date the Court Approval and Court Determination become Final,

then this Settlement Agreement shall become null and void for all purposes and any payments or other performances made hereunder shall be promptly restored to the paying or performing party.

(4) The Alimony Appeals have both been dismissed by orders denying those appeals, from which Vincent shall not further appeal.

F. The execution, delivery, exchange and filing, as appropriate, of the Settlement Payments (and all of Vincent's Alimony Obligations payments which shall have accrued by the date the Court Approval and Court Determination become Final but still remain unpaid, if any), the Residual Assignment, the Dismissals and the other instruments required hereunder shall take place as soon as practical after obtaining the Final Court Approval and Court Determination in accordance with the following closing procedures:

(1) The Settling Defendants shall provide their counsel with (i) the Settlement Payments (and any other accrued but unpaid payments due under Vincent's Alimony Obligations by the date the Court Approval and Court Determination become Final) in the form of cashier's checks issued by a Las Vegas, Nevada bank payable to the order of "Tom Grimmett, Trustee" and "Shinehouse & Duesing Trust Account", as appropriate, (ii) the executed Residual assignment, and (iii) any other instruments required to be executed by the Settling Defendants.

(2) Plaintiffs shall each provide their respective counsel with any instruments required to be executed by Plaintiffs.

(3) The counsel for the parties shall meet at the offices of Shinehouse & Duesing to execute the various Dismissals on behalf of their respective clients, as appropriate (which each party hereby authorizes its respective counsel to execute) and distribute those items as follows:

(a) To counsel for Settling Defendants, the executed Dismissals for the Adversary Proceeding and the Alimony Proceedings, and any other instruments to which they are entitled.

(b) To counsel for Trustee, the cashier's check for the $40,000 Settlement Payment to him, and any other instruments to which he is entitled.

(c) To counsel for Joanne, the cashier's check for the $160,000 Settlement Payment to her (and any other accrued but unpaid payments due under Vincent's Alimony Obligations by the date the Court Approval and Court Determination become Final), the executed Residual Assignment, the executed Dismissals for the Alimony Appeals, and any other instruments to which she is entitled.

(4) Counsel for each party receiving an executed Dismissal is hereby authorized to promptly file each such Dismissal with the clerk of the appropriate court and submit an endorsed filed copy to the other counsel in that case.

G. Each party agrees to execute and deliver to each other party such additional instruments and assurances as may be reasonably requested to carry out the terms of this Agreement.

H. The Settling Defendants shall not from the date this Agreement is first signed by any of them in any manner directly or indirectly assist, or cooperate with, any of the Remaining Defendants in the Adversary Proceedings or the Rico Actions, or any other persons or entities, in connection with any matters relating thereto, including without limitation by providing any documents, information, or other assistance by the Settling Defendants or their respective related persons and entities, including especially but without limitation their current and former legal counsel, accountants, appraisers and other consultants. However, nothing in this provision shall prohibit the responsibility of the Settling Defendants and their respective related parties to comply with any subpoena, discovery request or other legal process duly issued to them by the Remaining Defendants or any others, provided that in such event the Settling Defendants and their respective related parties shall promptly provide Plaintiffs with copies of any such process and assert any relevant privileges, work product exceptions, or other exceptions to such subpoena, discovery or other legal process.

I. The Settling Defendants shall fully and completely cooperate with Plaintiffs' ongoing efforts against the Remaining Defendants in the Adversary Proceedings and the Rico Action, subject to any relevant privileges, work product exceptions, and/or other exceptions to discovery, by:

(1) Providing informal access to and copies of such additional documents and information in their possession or control as Plaintiffs, and each of them,

may determine to be appropriate in connection with the Adversary Proceeding or the Rico Actions.

(2) Appearing and testifying as a witness at trial in connection with the Adversary Proceeding or the Rico Actions pursuant to any subpoenas issued by Plaintiffs.

J. The Settling Defendants shall not take any voluntary or involuntary execution or other collection actions against, or directly or indirectly accept any payments from, (i) Patricia L. Brown, (ii) Patricia L. Brown, Limited, (iii) Beckley, Singleton, DeLanoy, Jemison, & List, Chtd., (iv) Paul Heeren, (v) Paul Heeren, MD, Ltd, or (vi) any of their respective associates, employees, shareholders, heirs, successors or assigns with respect to any matters, including without limitation any claims for relief against them until such time as Plaintiffs, and each of them, shall have first resolved all of their various claims for relief against those various named and related persons and entities, including without limitation those set forth in the Adversary Proceedings and the Rico Actions, and fully collected any resulting judgment or settlement. However, this provision shall not be deemed to prohibit the Settling Defendants from commencing any new, or continuing any existing litigation against those various named and related persons and entities through the point of obtaining final judgments.

K. The Settling Defendants shall not in any manner directly or indirectly interfere with or impair the manner in which the Trustee and Joanne may separately

determine and implement their respective rights and entitlements under this Agreement. Any rights hereunder collectively given to both Plaintiffs may be fully exercised by either Plaintiff separately or in conjunction with the other Plaintiff.

8. The effectiveness of this Agreement is condition upon:

A. Expiration of the ten day period for filing a notice of appeal as provided for in Bankruptcy rule 8002 after entry by the Debtor's Bankruptcy court of an order which does the following, (or immediately after entry of an order which denies a motion for rehearing of such an order under Bankruptcy rule 8015) (becomes "Final"):

(1) Approves the settlement and compromise contained herein pursuant to Bankruptcy rules 2002 and 9019 (the "Court Approval").

(2) Determines under the Nevada Contribution among Joint Tortfeasors Act and other comparable applicable law that this Agreement has been entered into in "good faith" (the "Court Determination") whereby:

(a) The Releases do not discharge or in any manner impair the Plaintiffs' claims for relief in the Adversary Proceedings, or any other claims, against the Remaining Defendants.

(b) The Releases discharge the Settling Defendants from contribution to any of the Remaining Defendants and the Dismissed Defendants.

(3) The taking of an appeal within the period during which an appeal may be taken from such an order shall not affect the Finality of the order unless the enforceability of the order has been expressly stayed by order of the Bankruptcy court pending such appeal.

B. The payment, execution and delivery by Settling Defendants to Plaintiffs of the Settlement Payments (and all of Vincent's Alimony Obligations payments which shall have accrued by the date the Court Approval and Court Determination become Final but still remain unpaid, if any) along with the Residual Assignment and instruments described herein upon obtaining the Final Court Approval and Court Determination.

C. The warranties and representations contained herein are, and shall be, true and correct as of (i) the execution hereof, (ii) the Final Court Approval and Court Determination, and (iii) the payment, execution and delivery of the Settlement Payments and instruments described above.

9. The parties agree that the following Additional Provisions shall apply:

A. In the event that any section, paragraph, sentence, or clause of this Agreement is held invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or unenforceability of the remainder of this Agreement.

B. As used herein, the masculine, feminine, and neuter genders shall each include the others and the singular shall include the plural as necessary to give meaning thereto.

C. Time is of the essence herein.

D. This Agreement contains the entire understanding of the parties and there are no warranties, representations, or covenants other than those set forth herein.

E. Each party acknowledges that he has been given the full and complete opportunity to (i) read this Agreement, (ii) examine and inspect the underlying subject matter, and (iii) obtain counsel of that party's own choice prior to entering into this Agreement.

F. This Agreement may not be modified, amended, or changed, except by a writing specifying the modification, amendment, or change which is signed by all of the parties.

G. Each party agrees that this Agreement shall be construed and interpreted under the laws of the State of Nevada according to its fair meaning with equal benefit to all parties and that in the event that any legal proceedings may be required to enforce, interpret, or construe this Agreement, such proceedings shall be instituted and pursued in the Courts located in Clark County, Nevada.

H. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which shall constitute one instrument.

I. Each person signing this Agreement (i) warrants and represents that he has the full and complete authority to do so and (ii) shall indemnify and hold harmless each party (and the related persons and entities

of each party) from any and all claims, demands, liabilities, harm or loss (including without limitation attorneys fees and costs) arising out of or in connection with the breach by that person of this warranty and representation (which warranty, representation and indemnity shall survive the execution and performance of this Agreement).

/s/ TR Grimmett
TOM GRIMMETT, Trustee of Debtor's Bankruptcy estate and the President of Vincent Siragusa, MD, Ltd, a Nevada corporation:

JOANNE M. SIRAGUSA, individually and ex rel the Trustee in Adversary Proceeding Number 89-0068

/s/ Vincent Siragusa
VINCENT SIRAGUSA, individually and as President of V. Siragusa, MD, Chartered

ACKNOWLEDGMENTS

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

On June 28 , 1994, before me, the undersigned Notary Public in and for said County and State, duly commissioned and sworn, personally appeared ~~Tom Grimmett~~ Vincent Siragusa, known to me to be the person described

in, and who executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

WITNESS my hand and official seal.

/s/ Alene L. Hintz
NOTARY PUBLIC in and for
said County and State

[SEAL]
NOTARY PUBLIC
STATE OF NEVADA
County of Clark
Alene Louise Hintz
My Appointment Expires
illegible 2, 1998

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

On ___, 1994, before me, the undersigned Notary Public in and for said County and State, duly commissioned and sworn, personally appeared Joanne Siragusa, known to me to be the person described in, and who executed the foregoing instrument, and who acknowledged to me that she executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

WITNESS my hand and official seal.

NOTARY PUBLIC in and for
said County and State

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

On July 11, 1994, before me, the undersigned Notary Public in and for said County and State, duly commissioned and sworn, personally appeared ~~Vincent Siragusa~~ Tom R. Grimmett, known to me to be the person described in, and who executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

WITNESS my hand and official seal.

/s/ Z. Wageman
NOTARY PUBLIC in and for
said County and State

[SEAL]
Z. Wageman
Notary Public
CLARK COUNTY
My Commission Expires
August 15, 1994

D. This Agreement contains the entire understanding of the parties and there are no warranties, representations, or covenants other than those set forth herein.

E. Each party acknowledges that he has been given the full and complete opportunity to (i) read this Agreement, (ii) examine and inspect the underlying subject matter, and (iii) obtain counsel of that party's own choice prior to entering into this Agreement.

F. This Agreement may not be modified, amended, or changed, except by a writing specifying the modification, amendment, or change which is signed by all of the parties.

G. Each party agrees that this Agreement shall be construed and interpreted under the laws of the State of Nevada according to its fair meaning with equal benefit to all parties and that in the event that any legal proceedings may be required to enforce, interpret, or construe this Agreement, such proceedings shall be instituted and pursued in the Courts located in Clark County, Nevada.

H. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which shall constitute one instrument.

I. Each person signing this Agreement (i) warrants and represents that he has the full and complete authority to do so and (ii) shall indemnify and hold harmless each party (and the related persons and entities of each party) from any and all claims, demands, liabilities, harm or loss (including without limitation attorneys fees and costs) arising out of or in connection with the breach by that

person of this warranty and representation (which warranty, representation and indemnity shall survive the execution and performance of this Agreement).

TOM GRIMMETT, Trustee of
Debtor's Bankruptcy estate and
the President of Vincent
Siragusa, MD, Ltd. a Nevada
corporation:

/s/ Joanne M. Siragusa
JOANNE M. SIRAGUSA,
individually and ex rel the
Trustee in Adversary
Proceeding Number 89-0068

/s/ Vincent Siragusa
VINCENT SIRAGUSA,
individually
and as President of V.
Siragusa,
MD, Chartered

ACKNOWLEDGMENTS

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

On June 28, 1994, before me, the undersigned Notary Public in and for said County and State, duly commissioned and sworn, personally appeared Tom Grimmett, known to me to be the person described in, and who

executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

WITNESS my hand and official seal.

/s/ Alene L. Hintz
NOTARY PUBLIC in and for
said County and State

[SEAL]
NOTARY PUBLIC
STATE OF NEVADA
County of Clark
Alene Louise Hintz
My Appointment Expires
illegible 2, 1998

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

On July 11, 1994, before me, the undersigned Notary Public in and for said County and State, duly commissioned and sworn, personally appeared Joanne Siragusa, known to me to be the person described in, and who executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

WITNESS my hand and official seal.

/s/ Susan K. Sincere
NOTARY PUBLIC in and for
said County and State

[SEAL]
Notary Public State of Nevada
COUNTY OF CLARK
SUSAN K. SINCERE
My Commission Expires
May 10, 1996

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

On ___, 1994, before me, the undersigned Notary Public in and for said County and State, duly commissioned and sworn, personally appeared Vincent Siragusa, known to me to be the person described in, and who executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

WITNESS my hand and official seal.

NOTARY PUBLIC in and for
said County and State

ASSIGNMENT OF DEBTOR'S RESIDUAL RIGHTS IN BANKRUPTCY ESTATE

In consideration of the mutual releases, covenants, and other undertakings set forth in that Settlement Agreement and Mutual Release between, among others, Vincent Siragusa as debtor and Joanne M. Siragusa as a creditor, Vincent Siragusa as debtor in the United States Bankruptcy Court for the District of Nevada Case Number BK-S-87-3085-LBR hereby irrevocably transfers, conveys and assigns to Joanne M. Siragusa all of his right, title and interest as debtor to receive any and all distributions from his Bankruptcy Estate, including without limitation the debtor's rights to receive any distributions under Bankruptcy Code Section 726(a)(6).

_____

VINCENT SIRAGUSA,
individually

ACKNOWLEDGMENT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

On ___, 1994, before me, the undersigned Notary Public in and for said County and State, duly commissioned and sworn, personally appeared Vincent Siragusa, known to me to be the person described in, and who executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

WITNESS my hand and official seal.

_____

NOTARY PUBLIC in and for
said County and State

_____

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Attorneys for Trustee
Tom Grimmett & Vincent
Siragusa, MD, Ltd.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

In re: VINCENT SIRAGUSA, Debtor.	)	BK-S-87-3085-LBR Chapter 7
JOANNE M. SIRAGUSA individually and ex rel TOM GRIMMETT, Trustee, Plaintiff, v. VINCENT SIRAGUSA, et al, Defendants.	)	ADVERSARY PROCEEDING NO. S-89-0068
And Related Counter And Crossclaims	)	

TOM GRIMMETT, Trustee of the Bankruptcy Estate of VINCENT SIRAGUSA, Plaintiff, v. JOHN BOWERS; et al, Defendants.	)	ADVERSARY PROCEEDING NO. S-90-0216

STIPULATION AND ORDER FOR DISMISSAL BETWEEN (i) TRUSTEE AND JOANNE M. SIRAGUSA AND (ii) DEBTOR AND V. SIRAGUSA MD CHTD

Hearing Date: None
Hearing Time: None

STIPULATION

In accordance with the provisions of:

1. Section 7.B. of the Settlement Agreement and Mutual Release (the "Settlement Agreement") between (i) (a) Tom Grimmett as the trustee (the "Trustee") in this Chapter 7 bankruptcy case for Vincent Siragusa as debtor, (b) Vincent Siragusa, MD, Ltd, a Nevada corporation wholly owned by the Trustee, and (c) Joanne M. Siragusa, individually and ex rel the Trustee ("Joanne") as one party (collectively the "Plaintiffs") and (ii) (a) debtor and (b) V. Siragusa MD Chtd (collectively the "Debtor Defendants"); and

2. This court's Order Granting Motion for Approval of Compromise and Settlement Agreement and Making Good Faith Determination with Debtor and V. Siragusa

MD Chtd Only entered herein which has now become Final;

Plaintiffs and Debtor Defendants, and each of them, stipulate:

1. The debtor stipulates to the discharge revocation relief requested by Plaintiffs pursuant to Bankruptcy Code Section 727 in Adversary Proceeding Number 89-0068 (the "Discharge Revocation").

2. The Plaintiffs, and each of them, stipulate to dismiss with prejudice all of their other respective claims for relief in these adversary proceedings against only the Debtor Defendants, and each of them (the "Dismissals").

3. Neither the execution nor the performance of the Settlement Agreement by any party shall constitute or be deemed to be an admission of any liability, wrongdoing or impropriety on the part of that party, or any lack of merit in the claims or defenses of that party. Rather, such execution and performance are intended to in good faith compromise and fully, finally and completely resolve and settle the matters and disputes which are the subject of this Agreement. Without limiting the generality of the foregoing:

A. With respect to debtor, such execution and performance, and any Court Approval and Court Determination, of the Settlement Agreement shall not (i) constitute an admission or finding of any fraud or other wrongdoing or (ii) be used by anyone, including without limitation the Plaintiffs and the Remaining Defendants, in any judicial proceeding to support any such admission or finding.

B. With respect to Joanne, such execution and performance, and any Court Approval and Court Determination, of this Agreement shall not (i) constitute an admission or finding of any lack of fraud or other wrongdoing or (ii) be used by anyone, including without limitation the Settling and Remaining Defendants in the Adversary Proceedings, in any judicial proceeding to support any such admission or finding.

4. Each party to this stipulation shall bear his own respective attorneys fees and costs.

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By _____

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ORDER

This court has considered the foregoing stipulation, the Settlement Agreement, and this court's Order Granting Motion for Approval of Compromise and Settlement Agreement and Making Good Faith Determination with Debtor and V. Siragusa MD Chtd Only, and for good cause shown, approves this stipulation and orders the Discharge Revocation and Dismissals specified therein as between the stipulating parties only.

Dated: ___, 1994.

_____
U.S. BANKRUPTCY JUDGE

_____

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DISTRICT COURT, FAMILY DIVISION

CLARK COUNTY, NEVADA

JOANNE M. SIRAGUSA, Plaintiff, vs. VINCENT SIRAGUSA, Defendant.	CASE NO. D. 58232 DEPT. NO. VIII DOCKET "M" DATE OF HEARING: TIME OF HEARING: ORAL ARGUMENT REQUESTED: ____yes ___x__ no

STIPULATION FOR SETTLEMENT, DISCHARGE OF ALIMONY OBLIGATIONS AND DISTRICT COURT ORDER

COME NOW, the Plaintiff, JOANNE M. SIRAGUSA, by and through her counsel, B.R. SHINEHOUSE, ESQ., of SHINEHOUSE & DUESING, and the Defendant, VINCENT SIRAGUSA, by and through his counsel, SCOTT MICHAEL CANTOR, ESQ., of GRAZIADEI & CANTOR, LTD., and hereby stipulate, as follows:

WHEREAS, on August 19, 1983, the Plaintiff and Defendant, as spouses, entered into a Property Settlement Agreement which was subsequently incorporated and

merged into a Decree of Divorce entered in this case on September 23, 1993, and

WHEREAS, the Property Settlement Agreement was amended from time to time through January, 1987, and

WHEREAS, the Defendant filed a voluntary Petition for Bankruptcy in the United States Bankruptcy Court for the District of Nevada in 1987 as case number BK-S-87-3085-LBR, and

WHEREAS, the Bankruptcy Trustee in that action and the Plaintiff herein have filed certain claims in adversary proceeding numbers 89-0068 and 90-0216 against, in and among others, the Defendant herein, and

WHEREAS, various parties to the adversary proceedings, including the Plaintiff herein and the Defendant herein, have entered into a Settlement Agreement and Mutual Release which has been approved as a good-faith settlement by the United States Bankruptcy Court and,

WHEREAS, the Settlement Agreement and Mutual Release includes a comprehensive settlement of all outstanding claims by and between the Plaintiff and the Defendant herein, including the instant case and any appeals contemplated or resulting from the recent denial of a Petition for Rehearing in the Appeal of *Siragusa vs. Siragusa*, Nevada Supreme Court case number 22043, 108 Nev. 987 (1992).

NOW THEREFORE, the parties hereto stipulate, as follows:

1. Pursuant to certain of the provisions of the Settlement Agreement and Mutual Release, the Defendant has

paid to the Plaintiff the sum of One Hundred Sixty Thousand ($160,000.00) Dollars in full and complete satisfaction of any and all unaccrued alimony payments to become due to the Plaintiff from the Defendant pursuant to the extant orders of the Eighth Judicial District Court in this case from and after the date the Approval and Determination of Good-faith Settlement of the United States Bankruptcy Court became Final.

2. Pursuant to certain of the provisions of the Settlement Agreement and Mutual Release, the Defendant has paid to the Plaintiff any and all alimony obligations which accrued prior to the date the Bankruptcy Court's Approval and Court Determination of the Good-faith Settlement became Final.

3. Pursuant to certain of the provisions of the Settlement Agreement and Mutual Release, the Plaintiff hereby releases and discharges the Defendant, now and for all times, from any further obligations for the payment of alimony to her arising out of or pursuant to that certain Property Settlement Agreement of August 19, 1983, as subsequently amended by various Stipulations through January, 1987, and pursuant to the Decree of Divorce entered in this matter on September 23, 1983, and pursuant to all subsequent amendments to the Decree of Divorce requiring the payment of additional alimony obligations.

4. That the Defendant's payment to the Plaintiff of the sums set forth herein and as more fully set forth in the Settlement Agreement and Mutual Release shall be deemed to conclude and terminate the term of alimony established by the extant orders of the Eighth Judicial

District Court and shall operate as a discharge of all other alimony obligations, except as specifically set forth in that said Agreement which provides in part:

> "The dismissal in the divorce proceeding shall include a permanent waiver by Joanne of the right to create and/or enforce any further Alimony Obligations against Vincent (the "alimony waiver") and be in the form attached as Exhibit "3"; provided further that nothing in this Agreement shall be deemed to in any manner forgive or off-set any of Vincent's alimony obligations payments which shall have accrued by the date the Court Approval and Court Determination become Final."

5. The Plaintiff and Defendant have been advised by their respective counsel of the holding of the Nevada Supreme Court in the case of *Schryver vs. Schryver,* 108 Nev. 190 (1992), that a payor spouse may not deprive a Court of jurisdiction to modify future alimony payments by making advance payments of alimony in order to prematurely conclude the term of alimony; that being aware of the holding of Nevada Supreme Court in *Schryver vs. Schryver,* supra, and cognizant of its implication, the Plaintiff waives any right to seek any additional alimony or modification of alimony provisions upon the Bankruptcy Court's Approval and Court Determination becoming final and covenants that upon that Final Approval and Court Determination, payments to her by the Defendant herein shall constitute a termination of the term of alimony and forever bar her right to create and/or enforce any further alimony obligations against the Defendant, the holding of the Nevada Supreme Court in *Schryver vs. Schryver,* supra, notwithstanding.

6. That for and in consideration of the Plaintiff's permanent waiver of her right to create and/or enforce any further alimony obligations, subject to the terms and conditions of the Settlement Agreement and Mutual Release upon the Bankruptcy Court's Approval and Court Determination becoming Final, the Defendant waives any rights of which he may be possessed to seek a Writ of Certiorari in the United States Supreme Court from the disposition of his Appeal in the case of *Siragusa vs. Siragusa,* Nevada Supreme Court case number 22043, 108 Nev. 987 (1992).

DATED this ___ day of ___, 1994.

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ORDER

BASED upon the stipulation of the parties hereto and good cause appearing,

IT IS HEREBY ORDERED that the terms of the foregoing Stipulation be and the same are hereby approved and ratified by the Court; the terms and provisions thereof are *SO ORDERED.*

DATED this ___ day of ___, 1994.

DISTRICT JUDGE

Submitted by:

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

In Re: VINCENT SIRAGUSA, Debtor.	)	BK-S-87-3085-LBR Chapter 7
JOANNE M. SIRAGUSA individually and ex rel TOM GRIMMETT, Trustee, Plaintiff, v. VINCENT SIRAGUSA; et al, Defendants.	)	ADVERSARY PROCEEDING NO. S-89-0068
And Related Counter And Crossclaims	)	
TOM GRIMMETT, Trustee of the Bankruptcy Estate of VINCENT SIRAGUSA, Plaintiff, v. JOHN BOWERS; et al, Defendants.	)	ADVERSARY PROCEEDING NO. S-90-0216

ORDER GRANTING MOTION FOR APPROVAL OF COMPROMISE AND SETTLEMENT AGREEMENT AND MAKING GOOD FAITH DETERMINATION WITH DEBTOR DEFENDANTS ONLY

DATE: July 29, 1994
TIME: 2:00 p.m.

This court has considered (i) the papers filed in support of and in opposition to the above-named motion for approval of compromise and settlement agreement and good faith determination with debtor defendants only which was duly heard at the above time and date, (ii) the arguments advanced by counsel for the parties at that hearing, and (iii) the entire record in this bankruptcy case and the various adversary proceedings herein, and based thereon finds and orders that:

1. Neither the debtor nor any creditors of this estate have filed any objections to this motion for approval of compromise and settlement.

2. The requested approval pursuant to bankruptcy court rule 9019 is granted as the proposed compromise and settlement is fair and equitable and in the best interests of this bankruptcy estate based upon the overall facts and circumstances of this case, including without limitation the following factors which this court has especially considered for purposes of this approval:

A. The probability of success in the litigation.

B. Any difficulties to be encountered in the matter of collection.

C. The complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending to it.

D. The paramount interest of the creditors and a proper deference to their reasonable views.

3. The Settlement Agreement and Mutual Release attached to the above-named motion (which Agreement is herein incorporated by reference and with respect to which the following terms shall have the meanings set forth therein) was entered into by the moving parties in "good faith" within the meaning of, and otherwise in full compliance with, the Nevada Contribution Among Joint Tortfeasors Act, NRS 17.245, and other comparable applicable law in all respects.

4. The requested "good faith" determination with respect to the Agreement is made under the Nevada Contribution Among Joint Tortfeasors Act, NRS 17.245, and other comparable applicable law after first giving due consideration to all of the facts and circumstances of this bankruptcy case and the various adversary proceedings herein, the respective positions of the various parties, and the terms of that Agreement, whereby:

A. The Releases do not discharge or in any manner impair the claims for relief by the trustee or Joanne M. Siragusa in the Adversary Proceedings, or any other claims by them, against the Remaining Defendants.

B. The Releases discharge the Settling Defendants from contribution to any of the Remaining Defendants and the Dismissed Defendants in the Adversary Proceedings.

C. This court makes no determination as to the right, if any, of the Remaining Defendants to claim a reduction against the Trustee and/or Joanne M. Siragusa for the amounts provided for in and paid under the Agreement.

Dated: Aug. 4, 1994.

LINDA B. RIEGLE
U.S. BANKRUPTCY JUDGE

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(9)

Supreme Court, U.S.
FILED
OCT 15 1996

No. 95-1723

In The

Supreme Court of the United States

October Term, 1996

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA AND JOANNE SIRAGUSA,

Petitioners,

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., AND BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S ANSWERING BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the majority of Circuit Courts are correct in holding a civil RICO action accrues when a plaintiff knows, or reasonably should know she has been injured – without regard to whether the plaintiff knows the injury was part of a pattern of racketeering activity.

2. Whether the Ninth Circuit properly held a cause of action can accrue under civil RICO without the precise amount of damages, if any, becoming concretely established.

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OPINIONS BELOW

Respondent PATRICIA L. BROWN and PATRICIA L. BROWN, LTD., (hereinafter "BROWN") concurs in the presentation of Opinions Below contained in Petitioners' Opening Brief on the merits.

JURISDICTION

Respondent PATRICIA L. BROWN and PATRICIA L. BROWN, LTD., (hereinafter "BROWN") concurs in the presentation of Jurisdiction contained in Petitioners' Opening Brief on the merits.

STATUTES INVOLVED

Respondent PATRICIA L. BROWN and PATRICIA L. BROWN, LTD., (hereinafter "BROWN") concurs in the presentation of Statutes Involved contained in Petitioners' Opening Brief on the merits.

STATEMENT OF THE CASE

Petitioners incorrectly indicate this matter was only considered as a Motion to Dismiss and, therefore, the facts asserted by Petitioners must be deemed true in analyzing the correctness of the Ninth Circuit's decision. The decision by Judge Philip M. Pro and the affirming decision by the Ninth Circuit Court of Appeals relied not only on averments in the Complaint but also upon matters outside of that Complaint. To this extent, therefore, this matter was treated and analyzed as one for summary

judgment.[1] It is not, therefore, appropriate to focus exclusively on the statements of the Complaint. A fair reading of the Ninth Circuit Court of Appeals' decision indicates it honestly reflects the relevant facts which this Court needs to accurately ascertain the propriety of that decision. Accordingly, that factual statement is adopted by BROWN.

Essentially, Vincent and JOANNE SIRAGUSA divorced in 1983. At that time, Dr. Siragusa owned a one-third interest in a cardiology practice called the Heart Institute of Nevada ("HIN"); with two other doctors (Paul Hereen and John Bowers) who held the remainder equally.[2] One of the terms of the divorce involved JOANNE SIRAGUSA releasing her one-half community property interest in Vincent's regular ownership share in these various medical practices in exchange for certain monthly payments.

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[1] At no time did Petitioners object to the incorporation of evidentiary materials or factual assertions involving subjects exceeding the confines of the original Complaint which was dismissed. Therefore, Petitioners are deemed to have waived any arguments regarding supplementing the facts in the Complaint with this external material. Furthermore, to the extent these facts were asserted without the presence of documentary support, the refusal by Petitioners to lodge timely objections to that material should be deemed an effective waiver of any argument those facts were untrue or that Petitioners did not concede those facts were properly portrayed.

[2] In addition, Vincent Siragusa owned a 1/3 ownership interest in the Heart Institute Cath Lab and 27.55% in the Heart Institute property.

In 1987, Vincent defaulted; accordingly, JOANNE secured a state court judgment for the full amount of her interest.[3] Before JOANNE could collect on her judgment, however, Vincent filed for bankruptcy and claimed he no longer owned any interest in those medical practices.[4] On May 4, 1988, Vincent's property settlement obligations were discharged by the bankruptcy court, however his alimony was not. *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807, 809 (1992).

The assertion that Vincent Siragusa no longer owned an interest in the properties was supported by letters written by BROWN as counsel to the various Heart Institute medical practices. JA 198-99 at ¶ I. Specifically, BROWN asserted Vincent was in default, that he was given an opportunity to cure the default or be forced to

---

[3] Petitioners assert this Judgment was for an amount in excess of 1.4 million dollars in the 1989 bankruptcy complaint. Joint Appendix (hereinafter "JA") at p. 198, ¶ E. That ruling occurred on September 10, 1987. *Id.*

[4] The 1989 bankruptcy complaint avers Vincent Siragusa objected to the finding by the Domestic Relations Referee and brought the matter before the Eighth Judicial District Court for the State of Nevada on November 5, 1987. JA at 198, ¶ F. The Court adopted the Referee's findings, reduced the marital payment arrearages to judgment, and stayed enforcement for judgment of one week to allow Vincent Siragusa time to consult with counsel regarding undertaking the appeal. *Id.* On November 10, 1987, the Petition for bankruptcy was filed. *Id.* at ¶ G. On January 13, 1988, when he filed his schedules and Statement of Affairs, the position taken in those documents was that he no longer owned any interest in the Heart Institute entities and, therefore, JOANNE SIRAGUSA'S medical payment obligations had become unsecured.

sell his interests, that in August of 1987 the sale of his interests was forced by his partners, and that the sale conveyed his interests in the medical practices to his partners free of Petitioner SIRAGUSA's lien. *Id.* In the 1989 Complaint, Petitioners asserted the amount for which the property was sold was inadequate. *Id.* at ¶ J. Furthermore, they asserted the partnership agreement was "purportedly amended" by Vincent and his partners on June 25, 1987, to add the very forced sale on default provisions under which the debtor was "purportedly" given notice of default and under which the sale of Vincent's interests were forced. JA 201 at ¶ K(1).[5] Petitioners observed the events comprising the default referenced in the Default Notice were different from those contained in the concurrent correspondence from BROWN to Vincent. *Id.* at ¶ K(2). It was further asserted (in 1989) the purported basis for the default as identified by BROWN in a letter dated June 26, 1987 was untrue. *Id.* It was also asserted the August 1987 dates on which the sales were made were inconsistent with the Partnership Amendment and Default Notices. *Id.* at ¶ K(3).[6]

On May 2, 1989, JOANNE filed an adversary proceeding in Vincent Siragusa's bankruptcy (No. BK-S-87-3085-LBR). JA 186. While BROWN was not specifically named, the summum bonum of that Complaint

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[5] The clear tenor of the 1989 Complaint is that Petitioners questioned whether any of those counts had ever occurred or were honestly incurred.

[6] The basis for this last assertion was premised on the fact that as of September 4, 1987 BROWN represented no structural changes had taken place and she was negotiating with JOANNE's counsel to protect Vincent's interest in the Heart Institute entities. JA 202.

averred the named doctors and their business organizations had conspired to cheat JOANNE out of her share in Vincent's interests in the practices.[7] *See, e.g.,* JA 214-15.

Specifically, she claimed the activities which led to filing the bankruptcy constituted "a common plan and design to defraud [her] out of her rights under the Divorce Instruments" and the defendants had "actively participated in, aided, abetted, ratified and adopted for their own benefit the actions of the other defendants in furtherance of the Conspiracy." *Id.* The events allegedly proving the existence of this conspiracy repeatedly included the involvement of BROWN in preparing the documents and transmitting the information – without alleging direct liability for said involvement. JOANNE alleged because of secret side agreements that existed, Vincent continued to make as much money as he did before. She asserted other persons (whose identities were presently unknown) were also responsible for the matters which occurred. JA 189. In the 1989 Bankruptcy Complaint, she specifically articulated she had been concretely damaged in amounts which exceeded ten thousand dollars ($10,000.00) and was entitled to punitive damages. JA 215.

In the 1993 RICO Complaint, Petitioners reiterated the racketeering activity, in which BROWN had been allegedly involved, included the purported termination of Vincent's medical practice interests, the transfer of

---

[7] By filing that Complaint, JOANNE effectively put all parties in that bankruptcy proceeding – including the bankruptcy trustee – on notice of these allegations.

HIN's medical practice to Cardiology Associates of Nevada (hereinafter "CAN"), the filing of Vincent's bankruptcy petition and providing back-dated and fraudulent documents supporting the bankruptcy petition. JA 35-36. The Complaint asserted multiple fraudulent schemes existed which had, as their purpose, the obtaining of lucrative financial rewards of the medical practices at the expense and to the detriment of JOANNE SIRAGUSA (Petitioner), the bankruptcy estate and other victims.[8] This goal was allegedly achieved by purportedly terminating Vincent's medical practice interests; transferring HIN's medical practice to CAN; filing Vincent's bankruptcy; and providing backdated and otherwise fraudulent documentation regarding Vincent Siragusa's bankruptcy petition and the condition of his medical practice interests. JA 35-36. Thus, the allegations of the 1993 Complaint mirrored those contained in the 1989 petition – as the Ninth Circuit rightly noted. *See Grimmett v. Brown*, 75 F.3d 506, 509 (9th Cir.), *cert. granted*, 116 S. Ct. 2521 (1996). The only notable difference between the two Complaints was the November 1993 Complaint specifically named BROWN and claimed she was now the "mastermind" behind the entire scheme. *Id.*

As a result of this activity, Petitioners asserted their injuries had geometrically increased to an amount in excess of 6 million dollars ($6,000,000.00). *See, e.g.*, JA 71, 102, 106, 111. Against this factual backdrop, the decision of the Ninth Circuit was appropriately made.

[8] The other victims are, of course, not parties to this action nor were they named-parties in the Complaint. Accordingly, their interests are not relevant to a consideration of the matters at issue. *Id.*

SUMMARY OF THE ARGUMENT

Two polar accrual methods have been set before this Court in the context of a civil RICO action. The majority rule, espoused by the Ninth Circuit, most clearly accords with fundamental principles of fairness and equity – while ensuring the remedial purposes of RICO are met. It requires a plaintiff to timely prosecute for damages based on discovery of injury without requiring concurent knowledge of a pattern. In this case, that accrual point occurred, at the latest, over four years before the instant complaint was filed.

Even under the minority rule, Petitioners knew, or should have known, of the existence of a pattern of alleged racketeering activity designed to injure them by May of 1989 – over four years before this complaint was filed. Thus, under either approach, the claims are time-barred and were properly dismissed.

Petitioners not only had knowledge of the proscribed alleged behavior and the associated pattern, they also knew of the injury by May of 1989. The property settlement was discharged the year before due to behavior the May 1989 adversary proceeding monickered as fraudulent. It was a sum certain. Petitioner sought compensatory and punitive damages in that 1989 proceeding. Therefore, any damages were not speculative in nature so as to warrant any delay in the accrual of the RICO claim.

With definite damages by May of 1989, under either accrual approach, the matter was time-barred when this complaint was filed over four years after the May 1989 adversary proceeding was filed. Accordingly, the Ninth Circuit's decision must be upheld.

ARGUMENT

I. PETITIONERS' 1994 LITIGATION WAS PROPERLY BARRED BY THE STATUTE OF LIMITATIONS

It is not disputed this Honorable Court, in *Agency Holding Corp. v. Maley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987), held a four-year statute of limitations applied to litigation promised upon the Racketeering and Corrupt Influences Organization Act, 18 U.S.C. §§ 1961-68. The only question before this Court – in the present context – is whether knowledge of a pattern is required before the cause of action can properly accrue. It is respectfully submitted, in this case, Petitioners' cause of action would have been barred under the utilization of either method of calculating when a RICO violation accrues.

A. GENERAL STANDARDS REGARDING STATUTES OF LIMITATIONS

Statutes of limitations "have long been respected as fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478 (1980).

> Statutes of limitations, which are "found and approved in all systems of enlightened jurisprudence," [ ] represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified

> period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them."

United States v. Kubrick, 444 U.S. 111, 117 (1979) (citations omitted). Indeed, statutes of limitations "have been part of the law of every civilized nation from time immemorial." *Hargraves v. Brackett Stripping Machine Co.*, 317 F. Supp. 676, 682 (E.D. Tenn. 1970).

> [N]o class of laws is more universally sanctioned by the practice of nations, and the consent of mankind. . . . Such laws have frequently passed in review before this court; and occasions have occurred in which they have been particularly noticed as laws not to be impeached on the grounds of violating private right. What right has anyone to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights? All the reasonable purposes of justice are subserved, if the courts of the state have been left open to the prosecution of suits for such a time as may reasonably raise a presumption in the occupyer [sic] of the soil that the fruits of his labor are effectually secured beyond the chance of litigation.
>
> . . . .
>
> It is not to be questioned, that laws limiting the time of bringing suit, constitute a part of the *lex fori* of every country: they are laws for administering justice; one of the most sacred and important of sovereign rights and duties: and the restriction which must materially affect both legislative and judicial independence.

Hawkins v. Joshua Barney's Lessee, 5 Pet. (30 U.S.) 457, 466 (1831). Therefore, if an injured party fails to assert a claim

in a timely manner, the cause of action, irrespective of merit, will be forfeited forever. *Pangrazzi v. United States*, 511 F. Supp. 648, 649 (E.D. Pa. 1981). The question of whether a statute of limitations applies is a matter of law and may be decided pursuant to a Fed. R. Civ. Pro. 12(b)(6) motion. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980).

The proper focus is on the *time* of the discriminatory or injurious acts, *not* the time when the *consequence* of the acts becomes most painful. *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). Each injurious act begins the running of the statute of limitations at the time of its *occurrence*, as opposed to when the plaintiff becomes aware of her or his legal rights regarding the same. *Kubrick*, 444 U.S. at 122. It is respectfully submitted the policy followed by the majority of federal circuits, including the Ninth Circuit, of holding a cause of action for RICO accrues at the time the injured party knows of or reasonably should have discovered the injury most closely comports with these concerns. Since Petitioners knew of the "injury" by May of 1989, at the latest, this action was time-barred when filed in November of 1993.

B. A CIVIL RICO ACTION ACCRUES WHEN A PARTY KNOWS OR SHOULD HAVE KNOWN OF THE INJURY

The elements of a civil RICO claim are simple enough. They require an individual be injured through the conduct of an enterprise by a pattern of racketeering activity (known as "predicate acts") causing injury to business or property. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985); 18 U.S.C. §§ 1962(c) & 1964(c). In analyzing

the RICO statute of limitations question, this Honorable Court specifically referenced anti-trust law and the Clayton Act to guide its decision-making process. *Agency Holding*, 483 U.S. at 151; *see also* 113 Cong. Rec. 18,007 (1967) (introducing the forerunner to RICO as an *addition* to the Sherman Act instead of an independent act). This Court also noted RICO bears a similarity to 42 U.S.C. § 1983 – the civil rights statute. 483 U.S. at 149. It follows reason, therefore, to apply an accrual method similar to that utilized under these Acts in determining when a Civil RICO cause of action accrues.

Utilizing these guidelines, the accrual method employed by the Ninth Circuit most clearly conforms with the accrual methods utilized by these other acts. In a pre-*Agency Holding* case, the Ninth Circuit Court of Appeals first addressed the issue of when, under RICO, a cause of action accrued. In *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984), the Circuit held the mere existence of a conspiracy did not generally postpone accrual of causes of action arising from the conspirator's separate wrongs; hence, it was "the wrongful act, not the conspiracy, which [was] actionable in a civil case." 732 F.2d at 1433. Noting RICO did not provide a civil statute of limitations, the Court adopted the general federal rule that a statute of limitations begins to run when the plaintiff knew or had reason to know of the injury which was the basis for the action. *Id.*

> We see no reason here to depart from the general rule. Although RICO does not specifically outlaw conspiracies to violate the substantive provisions of the statute, 18 U.S.C. § 1962(d), RICO's civil remedy section permits suit by persons injured in their business or property, 18

> U.S.C. § 1964(c). The civil remedy provision's focus upon injury as opposed to existence of a conspiracy suggested the normal federal rule on accrual should apply to civil RICO actions alleging conspiracy.

Id. Accordingly, it held the RICO claim was barred since it was based on the same facts as a § 1983 conspiracy claim which was also time-barred.

Since *Agency Holding*, the Ninth Circuit has continued to maintain that position on accrual. In *State Farm Mutual Automobile Ins. Co. v. Ammann*, 828 F.2d 4 (9th Cir. 1987), the Circuit re-affirmed its position regarding when a cause of action under RICO accrued. Then-Circuit Judge Kennedy concurred in the decision – *noting the accrual rule utilized was the same found in § 1983 and anti-trust actions*. 828 F.2d at 5. He further stated that position allowed a new cause of action to be brought when a separate and distinct injury was incurred as the result of additional acts specifically proscribed in the RICO provisions. *Id.*[9]

Other Circuits have allied themselves with the position correctly articulated by the Ninth Circuit. Each has predicated its analysis on § 1983 or anti-trust law. For example, in *Rodriguez v. Banco Central*, 917 F.2d 664 (1st Cir. 1990), then-Chief Judge Breyer offered an opinion setting forth the position of the First Circuit on when a cause of action under RICO accrued. Justice Breyer claimed to start "[t]he statute running when a plaintiff

[9] This position is known as the doctrine of separate accrual.

knew or should have known of his injury seems consistent with the language of RICO's 'treble damage' provision." 917 F.2d at 666. This accrual rule was similar to the Clayton Act rule of accrual and to the accrual concepts governing actions for fraud. *Id.* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)).

Justice Breyer expressed his concern about ensuring the concept of statute of limitations had meaning. 917 F.2d at 667. Concerned that applying any other rule would result in extended periods of time from the time the plaintiff was first aware of injuries – even if no predicate act had occurred – he articulated the resulting litigation would be antithetical to express concerns about bringing RICO actions before memories of witnesses faded or evidence was lost. *Id.* (citing *Agency Holding*, 483 U.S. at 156).[10] Hence, he held the First Circuit would, from that time forward, adhere to the accrual standards articulated by the Second Circuit in *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1009 (1989). *Id.*

In *Bankers Trust Co.*, the Court acknowledged the accrual issue had been the subject of wrestling by the judiciary. To end the dispute between district courts within the Second Circuit, the Court took the position "a

[10] He noted, however, the presence of fraudulent concealment could result in tolling the statute of limitations. 917 F.2d at 668. Notably, while Petitioners argued fraudulent concealment applied in this case before the Ninth Circuit, they have not re-visited that argument in the Opening Brief and are deemed to have abandoned that argument on appeal. *See Eberle v. Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990); *Wilcox v Commissioner*, 848 F.2d 1007 (9th Cir. 1988). This argument will not, therefore, be discussed in any further detail.

cause of action to recover damages based on that injury [a violation of 18 U.S.C. § 1962] accrues to plaintiff at the time he discovered or should have discovered the *injury*." 859 F.2d at 1102 (emphasis added). Two major sources supported its opinion.

First, there was the plain language of the statute. 859 F.2d at 1102. The focus was not upon the time of the RICO violation but on when the plaintiff actually suffered *injury* to the business or property from the violation. 859 F.2d at 1103. The second source was found, by analogy, in the Clayton Act itself. The Court noted a cause of action under the Clayton Act accrues and the statute of limitations begins to run when a defendant commits an antitrust violation that injures a plaintiff's business. 859 F.2d at 1104. Absent an additional period for tolling, the action for the injury must be brought within four years from the date the events occurred and plaintiff became aware of same. *Id*. By utilizing the separate accrual rule articulated in the Ninth Circuit by Justice Kennedy, the Second Circuit held the remedial purposes of RICO were best satisfied while maintaining an integrity to the underlying purposes for statutes of limitations under this accrual method. Accordingly, each time a plaintiff discovered or should have discovered an injury caused by a separable violation of § 1962, a new cause of action arose as to that injury. The plaintiff must, at that point, bring the action within four years of the accrual to recover damages for the specific injury. 859 F.2d at 1104.

In *Pocahantas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987), the Fourth Circuit joined the First, Second and Ninth Circuits in holding the statutory period begins to run when a plaintiff knows or should know of the injury that underlies the cause of action. The

Fifth Circuit (pre-*Agency Holding*) also indicated the statutory period would begin to run under similar conditions. *La Porte Const. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986). This was because:

> The knowledge, whether actual or constructive, which an aggrieved party must have for the purpose of the commencing of the running of a statute of limitations is merely that of "the facts forming the basis of this cause of action," . . . not that of the cause of action itself.

Vigman v. Community Nat'l Bank & Trust Co., 635 F.2d 455, 459 (5th Cir. 1981) (citations omitted).

Finally, the Seventh Circuit has taken up the standard of her sister Circuits in holding a RICO claim accrues upon knowledge of an injury – not a requirement that a pattern be present. *McCool v. Strata Oil Co.*, 972 F.2d 1452 (7th Cir. 1992). In considering this matter, the Seventh Circuit noted utilizing the discovery principle was uncontroversial. 972 F.2d at 1465.[11] That Court aligned itself with this Court's standards when it focused its inquiry on the discovery of *injury* – not the discovery of a cause of action. *Id*. (citing *Kubrick*, 444 U.S. at 123). It further adopted a "separate accrual" rule to civil RICO claims. In

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[11] There must be a pattern of racketeering before the RICO claim accrues and that requirement could delay accrual until after the plaintiff discovered the injury – assuming no pattern existed at the time the injury was identified. *Id*. *McCool* also discussed the potential for equitable tolling to delay the running of the statute of limitations while a victim diligently investigates the possible existence and extent of a pattern of racketeering. *Id*. However, before this Court, Petitioners have not made equitable tolling an issue for consideration. Therefore, this, too, will not be addressed in any more detail.

other words, as to each separate injury, a new cause of action under RICO would arise and a suit to recover for that injury must be brought within the limitations period. *Id.* The Court was careful to note, however, the new cause of action would accrue only when there was a new instance of wrongful conduct and a new injury; "[d]ifferent injuries flowing from the same conduct are usually not actionable in separate lawsuits." 972 F.2d at 1465 n. 10.[12]

It justified its actions on the grounds that this Court made it clear RICO injuries flowed from individual predicate *acts*, not from the pattern itself. *Id.* (citing *Sedima*, 473 U.S. at 495-97). Its analysis was founded upon weighing the concerns a plaintiff has in bringing successive suits, the defendant's interest in repose, and the judicial system's interest in conducting trials based on fresh evidence. Accordingly, it found itself in-line with the position taken by the Ninth Circuit which this Court has cause to review on this Writ.

The public policy supporting the decision of the Ninth Circuit has been clearly articulated by these other courts and in the Ninth Circuit's decision which this Court is presently reviewing. The position is in direct accord with accrual concepts under the Clayton and Civil

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[12] The Court distinguished a civil RICO claim on the grounds that "each wrongful act that causes injury is a new cause of action, a new foul; in criminal RICO, on the other hand, the defendant is being punished for his participation in the pattern as a whole." 972 F.2d at 1466. The Court noted it also had used that rationale to distinguish between civil actions and criminal prosecutions under the Clayton Act – upon which RICO was modeled. *Id.* (citing *Baldwin v. Loew's Inc.*, 312 F.2d 387, 390 (7th Cir. 1963)).

Rights Acts. It fully comports with the articulated policies undergirding limitation periods. It provides a definite accrual point for both plaintiff and defendant. In short, it is the better-reasoned approach which fairly balances both parties' interests.

This is in direct contrast to the position which Petitioners seek to foist upon this Court. Succinctly, the concern with extending RICO accrual until a time that a party knows, discovers, or reasonably should have discovered, a *pattern* of racketeering is that it allows too much leeway to the plaintiff to the clear detriment of the defendant without good cause. It encourages sloth rather than diligence; complacency rather than an attentive protection of one's interests.

For example, under the argument espoused by Petitioners, an individual may know today they have been injured by a party's action. Nevertheless, they are "unsure" whether a pattern exists.[13] While the injured

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[13] In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), this Court recognized a failure on the part of Congress and the Courts to develop a meaningful concept of "pattern". 492 U.S. at 236. Holding evidence of prior events may not be sufficient unless the required elements of continuity plus relationship can be shown, this Court acknowledged:

> The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists.

492 U.S. at 243. Hence, while the concept of "injury" is concrete, the concept of "pattern" is not. To utilize the "pattern"

party may be able to eventually find other similar events occurring to unrelated individuals, one may still not be *sure* sufficient continuity and relationship exists to create a "pattern." Accordingly, the plaintiff may continue to refrain from filing an action until the amorphous point at which she becomes convinced in her own mind both relationship and continuity are present. None could reasonably dispute this dilemma. A dispositive motion would be fruitless. Thus, the plaintiff has unlimited time to file an action. The end result is the plaintiff must bring forth witnesses and evidence ranging over countless years to prosecute for injuries not freshly received – even though she knew of her injury long before – simply because she was unsure of the "pattern" element. The defendant meanwhile, is effectually left without an otherwise viable defense. Such a result is the unquestioned antithesis of the stated purpose behind statutes of limitations.[14]

More importantly, should this Court adopt accrual premised upon knowledge of a pattern of racketeering

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requirement as an accrual point for statute of limitations analysis introduces into that analysis an element which is so vague it fogs the point at which a party knew, or reasonably should have known, the pattern existed – rendering the limitations period a nullity in all but the most obvious cases.

[14] Although not a major focus of inquiry by either side, this same problem is amplified by the Third Circuit's "last predicate act" rule. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3rd Cir. 1988). Under that rule, a party can be injured today and wait for ten years for another act to occur which could constitute a "pattern". In the interim, memories fail, witnesses and evidence are lost, and, if the second event never occurs, the cause of action for the wrongful act is forever destroyed. Such a danger, too, is in stark contrast to the purposes for RICO.

activity, it could result in losses of valid causes of action. A party who is injured today by an act of, say, mail fraud might begin to investigate the "pattern" requirement necessary to bring a RICO action. The plaintiff may forestall litigating on the known injury in the desperate hope she can reap the benefits of civil RICO if only a pattern can be found. When the plaintiff ultimately determines no pattern exists, it may often be too late to prosecute her independent claims of individualized injury for that act of mail fraud. Thus, the defendant who engaged in mail fraud would not only be benefitted, but the plaintiff who has been wrongfully injured would have lost her action simply because she hoped to grasp the gold ring of RICO rather than actively and appropriately seek prosecution and restitution of the injuries she incurred once she knew, or reasonably should have known, she was so injured.

It is respectfully submitted there is no harm in requiring a plaintiff today – upon discovery of injury or at a time when, in the exercise of reasonable diligence, those injuries should have been discovered – to bring a suit for restitution of said injuries. The limitations periods for fraud or conspiracy, in Nevada, must be brought within three years. NRS 11.190; *Aldabe v. Adams*, 81 Nev. 280, 402 P.2d 34 (1965). If plaintiff brings the action within three years and begins, diligently, to do discovery, certainly she should be able to unearth within a year, evidence of a pattern sufficient to give rise to a claim under RICO. The Complaint could be timely amended within the limitations period.

Thus, the position articulated by the Ninth Circuit most appropriately addresses the concerns of RICO. It focuses on the injury – not the pattern. It encourages

plaintiffs to act quickly to protect their interests. It provides for separate accrual of new injuries based on independent and new acts in furtherance of a conspiracy to defraud or to engage in a RICO enterprise and even allows, as the *Grimmett* decision noted, the potential for equitable tolling in unique circumstances where such evidence could not otherwise come forth. It is the quintessential compromise; protecting the rights of the plaintiff and the defendants, while ensuring the claim will not become stale and the matter will be litigated while the evidence is still fresh and memories have not faded. It should, therefore, be sustained.

C. PETITIONER'S CAUSE OF ACTION IS ALSO BARRED UNDER THE "PATTERN" ACCRUAL METHOD

Even if this Court were to adopt the argument that civil RICO accrual requires not only knowledge of the injury but also discovery of a "pattern", it does not help Petitioners' cause whatsoever. As has already been established before this Court, in 1989 (when the Complaint in Bankruptcy Court was filed) Petitioners asserted JOANNE had been injured as a result of a conspiracy and, further, specifically articulated the various independent acts of fraud which she claimed combined to cause her injury. Even though she may not have known all the actors in the alleged conspiracy, she certainly knew it existed.

She further knew the acts were related. She knew they were continuous and were designed specifically to defraud her and the bankruptcy estate of funds to which she perceived she was entitled. Hence, she already knew

the pattern of racketeering activity had occurred which she thought was designed to cause her harm and which allegedly did, in fact, cause her harm.

Even the "pattern" discovery accrual rule could not alter the dismissal of her November 1993 litigation because Petitioner still was on notice of her injuries and the method by which they were procured. The latest date at which Petitioner could be heard to say she was unaware of those injuries was May of 1989 because she specifically articulated them in the bankruptcy proceeding.[15] Aware of the pattern, she had until May of 1993 to file suit. Why she chose to wait until November of 1993 is unexplained in the record. However, her decision has rendered her position moot. Her claim was, and is, time-barred.

The articulated public policy and concerns identified in the first two sections of this Brief are clearly seen in this case. By 1989 – within two years after the bankruptcy petition was first filed and one year after her interest in the properties was discharged – Petitioner was allegedly aware a conspiracy had taken place and that its intent was to defraud her. Assuming, for the moment, she did not know a pattern rising to the level of a RICO violation existed, had she filed her Complaint within three years

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[15] More likely, the accrual date for this event should go further back to 1987 when her estranged spouse filed bankruptcy. It is inconceivable that Petitioner – a community interest property holder with her husband who was fully aware of the scope and extent of his assets – would have believed her ex-husband could rapidly devolve into bankruptcy. Therefore, in 1987 when the bankruptcy petition was filed, Petitioner was originally put on notice something was amiss.

and aggressively pursued discovery, it is inconceivable she would not have been able to allege both continuity and relationship existed with these acts sufficient to give rise to a RICO violation. Thus, under the Ninth Circuit's approach, she had one year of court-ordered and mandated discovery tools at her disposal to aid her in determining whether a RICO violation existed.[16]

That she chose not to avail herself of these tools or to act expeditiously to protect her interests, is not a reason for this Court to alter the accrual rule or reverse the position articulated by the Ninth Circuit. More importantly, while not knowing all the actors or even the full breadth of the supposed conspiracy, she certainly had enough information to put her on notice of a potential pattern of racketeering sufficient to give rise to accrual under the minority position espoused by Petitioners. *See Bivens Garden Offices Bldg. v. Barnett Bank*, 906 F.2d 1546, 1553-54 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991). Therefore, it is respectfully submitted the Ninth Circuit's position must be affirmed.

II. PETITIONERS' INJURIES WERE PRESENT, IF AT ALL, AT THE TIME THE 1989 COMPLAINT WAS FILED

A review of Petitioners' injury arguments appear to indicate JOANNE SIRAGUSA's injury cannot be determined until the conclusion of the adversarial bankruptcy

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[16] Actually, had she been truly concerned about her interests, she could have filed on those claims in 1989 when she filed her adversarial proceeding. All the alleged elements were present. This would have given her four years – assuming a May 1989 accrual point – to discover the "pattern."

proceedings in this matter. Petitioners attempt to persuade this Court that before a RICO cause of action exists and its statute of limitations begins to run, a potential plaintiff's damages must be certain in amount. Accordingly, she asserts her injuries are not "concrete" and the statute of limitations does not begin to run until she definitely knows the amount of loss she will sustain. This logic is flawed for several reasons, as shall be demonstrated below.

A. PETITIONERS WERE AWARE OF THE EXTENT OF POTENTIAL DAMAGE BY MAY OF 1989

Petitioners are correct in stating that for a RICO cause of action to exist, there must be "injury to business or property". *Sedima*, 473 U.S. at 496. However, Petitioners have set forth no case law which would suggest the precise *amount* of injury must be known. The cause of action exists and the statute of limitations begins to run when the injury is known, without the requirement that the injured party know the full amount. 18 U.S.C. §§ 1964(c) & 1962(c); *Sedima*, 473 U.S. at 496; *Bankers Trust Co.*, 859 F.2d at 1100.

However in this particular case, this is an inconsequential distinction. For, clearly, at the time of filing the adversarial complaint in Bankruptcy Court on May 2, 1989, JOANNE SIRAGUSA was well aware of the alleged existence of her injury, as well as the amount of injury suffered. As referenced in the factual section of both the Petition and the instant Response, JOANNE's claim arises out of her perceived property interest in her ex-husband Vincent Siragusa's one-third joint venture interest in a

medical practice. The gyrations of the divorce proceedings immediately before the filing of the adversarial complaint in Bankruptcy Court in May of 1989 illustrate JOANNE SIRAGUSA's knowledge of when she became aware of her injury, as well as the dollar amount thereof.

On September 23, 1983, a decree of divorce was entered in the District Court, Clark County, Nevada, which incorporated the property settlement agreement of Petitioner and Vincent Siragusa. *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807, 808 (1992). That agreement provided in pertinent part that Vincent Siragusa would make alimony payments of $3,000.00 per month for 60 consecutive months, commencing 15 days from the date of the agreement (August 19, 1983), until either all of the 60 payments were made, JOANNE SIRAGUSA remarried, or either party died. *Id.* The agreement also provided Vincent Siragusa would purchase JOANNE SIRAGUSA's community property interest in Vincent Siragusa's medical practice for the sum of $1,250,000.00, to be paid over a period of 15 years in increasing monthly installments. *Id.*

By mid-1987, Vincent Siragusa had fallen into default on both the alimony and the property settlement obligations. 843 P.2d at 809. On November 5, 1987, the district court had orally announced it would enter judgment in favor of JOANNE SIRAGUSA in the amount of $1,300,000.00 in property settlement arrearages. *Id.* On November 10, 1987, Vincent Siragusa, who was solvent, filed a voluntary Chapter 7 petition for bankruptcy, *under which his property settlement obligation was discharged on May 4, 1988*, but his alimony obligations were not. *Id.*

Clearly, JOANNE SIRAGUSA was aware of the full value of her property interest in Vincent Siragusa's medical practice on September 23, 1983, when she agreed to that value in their divorce proceedings as a property settlement. Furthermore, on November 5, 1987, JOANNE entered a state district court in Nevada and requested the court enter a judgment in her favor in the amount of $1,300,000.00 in property settlement arrearages. Lastly, she was certainly aware of her damage and the amount thereof at the time the bankruptcy court discharged Vincent's property settlement obligation on May 4, 1988.

Petitioner was aware of her injury approximately 12 months before filing her adversarial proceeding and should have filed her RICO complaint at that time. She did not and must endure the poison for making that ill-advised decision.

A review of Petitioners' adversarial complaint filed in May of 1989 (JA 186) quickly reveals JOANNE SIRAGUSA was aware she had suffered an injury from the allegedly fraudulent reorganization of the medical entities. The amount of loss was certain because the definite sum of the property obligation had already been discharged. Petitioners could have brought a RICO complaint in federal district court at that time, thereby preserving the statute of limitations, but chose not to do so. Thus, the dismissal by the Federal District Court of the November, 1993 complaint (filed four and one-half years after the adversarial proceeding) was appropriate and should be upheld by this Court, as it was by the

Ninth Circuit.[17] *See, Hapaniewski v. City of Chicago Heights*, 883 F.2d 576 (7th Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

For Petitioners to tell this Court that JOANNE SIRAGUSA's claim is not ripe because she is uncertain as to the amount of her damage is preposterous. The above facts, as found in the matter of *Siragusa v. Siragusa, supra*, clearly indicate, in May of 1989, if not before, she knew that she was injured, in what amount, and by whom.

As this Court has long held, "if a defendant engages in a pattern of racketeering activity in a manner forbidden by 18 U.S.C. § 1962(a)-(c), and the racketeering activities injure a plaintiff in his business or property, the plaintiff has a claim under 18 U.S.C. § 1964(c)." *Sedima*, 473 U.S. at 495. "[A] defendant who violates § 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Sedima*, 473 U.S. at 496-97; *see Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 389 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). Where a plaintiff alleges each element of a violation, the compensable injury necessarily is the harm caused by the predicate act sufficiently related to constitute a pattern – for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed under

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[17] The presence of an ongoing bankruptcy proceeding or the institution of an adversary proceeding before the bankruptcy court has *no* effect on the limitations period; hence, no tolling argument could be advanced. *See Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067 (2d Cir. 1993); *Mamer v. Apex R.E. & T.*, 852 F. Supp. 870 (E.D. Mo. 1994), *aff'd*, 59 F.3d 780 (8th Cir. 1995).

the circumstances delineated in 18 U.S.C. § 1962(c), "an activity which RICO was designed to deter." Any recoverable damages occurring by reason of a violation of § 1962 will flow from the commission of the predicate acts. *Sedima*, 473 U.S. at 497.

A review of the complaint filed in the adversarial proceeding in bankruptcy court in May of 1989, compared to that filed in the federal district court in November of 1993, illustrates that both contain allegations of the predicate acts, and that she was injured as a result thereof. In May of 1989, Petitioners were well aware of the predicate acts which allegedly resulted in the perceived injury. Hence, the statute had clearly run by the time Petitioners filed their case in the federal district court on November 24, 1993.[18]

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[18] Even if this Court was to apply a separate accrual rule which states that for each injury caused by a RICO violation, the limitation period accrues for that injury when a plaintiff knew or should have known of the injury, this would be of no assistance to Petitioners. *See Ammann*, 828 F.2d at 5.

In this case, a review of the instant Petition, together with their briefs filed in the lower courts, illustrates that Petitioners allege Respondents continued to engage in RICO violations well after May of 1989. However, Petitioners have not alleged a separate or independent injury resulting from the continued acts. Rather, Petitioners alleged in the November 1993 Complaint, one continuing pattern of racketeering activity which allegedly injured Petitioners' claim to her property interest in the medical practice of Vincent Siragusa. Thus, allegedly constituting a single scheme with one purpose: to divest Petitioner SIRAGUSA of her interest in the medical practice.

B. PETITIONER SOUGHT MORE THAN MERELY EQUITABLE RELIEF IN MAY OF 1989

Petitioners attempt to demonstrate the premature nature of JOANNE SIRAGUSA's RICO claim at the time she filed her initial adversarial proceeding in bankruptcy court because she only sought equitable relief. However, what Petitioners have failed to disclose to this Court is that she not only sought equitable relief, but *compensatory damages* against all Defendants in a sum in excess of $10,000.00, according to proof; an award for *punitive damages* against all Defendants in a sum in excess of $10,000.00, according to proof; and an award to Plaintiff of *reasonable fees and costs* against all Defendants for prosecuting that action. JA 215-16. Clearly, JOANNE SIRAGUSA believed she was injured at least to an extent in excess of $10,000.00 against each Defendant, coupled with an award of punitive damages by May 2, 1989. Thus, Petitioners' claim of prematurity for her RICO cause of action due to her request for equitable relief must be summarily discounted by this Court.

C. PETITIONER SIRAGUSA HAS FULLY RECOVERED ANY LOSS SHE MAY HAVE SUSTAINED

18 U.S.C. § 1964(c) provides that any person injured in his business or property by reason of a violation of RICO may recover treble damages and attorney's fees. While RICO is to be "liberally construed", it is well-established not all injuries are compensable under this section. A showing of "injury" requires proof of concrete financial loss, and not merely "injury" to valuable and

intangible property interests. *Oscar v. University Students Co-Op Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992), *cert. denied*, 506 U.S. 1020 (1992); *Fleischluer v. Feltner*, 879 F.2d 1290, 1299-1301 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990) (plaintiffs under § 1964(c) entitled to recover only for money they paid out as a result of racketeering activity).

In this particular case, JOANNE SIRAGUSA'S property interest in Vincent Siragusa's medical practice was in the amount of $1,300,000.00 (as of November 5, 1987). *Siragusa*, 843 P.2d at 808. That is the total amount of alleged injury. It was, and is, both definite and concrete.

However, as a result of the adversarial complaint filed in the bankruptcy proceeding in May of 1989, Petitioner SIRAGUSA received settlement funds from John Bowers, M.D. (a one-time joint venturer in the medical practice with Vincent Siragusa whom ultimately ended up with the entire medical practice) in the approximate amount of $1,400,000.00.[19] Also, Vincent Siragusa settled with JOANNE out of the adversarial proceeding for the approximate sum of $160,000.00. This makes Petitioners' settlement figure from two of the several Defendants named in the bankruptcy adversarial proceeding an estimated $1,560,000.00. Thus, she recouped more than her alleged property interest – valued at $1,300,000.00. Any injury she may have had as a result of the alleged conduct of the various Defendants involved in the instant RICO action allegedly acting in concert with those settling Defendants named in the adversarial proceeding no longer exists. Accordingly, Petitioners' injury claim under

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[19] This fact was referenced in Co-Respondent Beckley, Singleton's Answering Brief before the Ninth Circuit, filed on November 14, 1994 (JA 7) at pp. 30-31.

RICO cannot now be maintained against the Defendants named in the federal RICO Complaint, as JOANNE SIRAGUSA has been fully compensated. *See Fleischluer*, 879 F.2d at 1299-1301; *Sedima*, 473 U.S. at 496.

CONCLUSION

For the foregoing reasons, Respondents respectfully ask this Court to sustain the decision of the Ninth Circuit in this case and hold that this litigation was time-barred at the time it was filed in November 24, 1993.

Respectfully submitted this 15th day of October, 1996.

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In The

Supreme Court of the United States

October Term, 1996

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA, and JOANNE SIRAGUSA,

Petitioners,

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., and BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I. PETITIONERS' RICO ACTION DID NOT ACCRUE IN 1989, NOR IS IT MOOT

Both Respondents present several arguments which merely serve to re-emphasize one of Petitioners' principal points: until Joanne Siragusa is compelled to accept less than 100% of her pre-existing debt she has not suffered concrete RICO damage. In attempting to evade the logic of *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1017 (1989), Respondents cannot agree amongst themselves as to the time of Joanne's RICO injury. Respondent Brown argues that Joanne knew of her potential injury in 1989 so the limitations period has already run. Respondent Beckley, Singleton argues that Joanne may have been injured as a result of her 1994 settlement with her husband but inexplicably concludes that the RICO case is moot. Neither position has merit.

1. As detailed in Petitioners' initial brief, the various divorce proceedings between Joanne and Vincent Siragusa, summarized by the Supreme Court of Nevada in *Siragusa v. Siragusa*, 843 P.2d 807 (Nev. 1992), resulted in Vincent's substantial indebtedness to Joanne in terms of both alimony and property settlement obligations. At the time Vincent filed for Chapter 7 bankruptcy protection, on November 10, 1987, these obligations included both arrearages and future payments. *Id.* at 809.

Respondent Brown urges that Joanne's RICO injury occurred when she filed her Adversary Complaint in Bankruptcy Court in 1989, yet she tacitly admits that Joanne, at best, had suffered only *"potential* damage." Respondent Brown Answering Brief at 23 (emphasis added). As Petitioner explained in her initial Brief, "an

attempt, even a successful attempt, to subvert an underlying security interest . . . is not itself a RICO injury unless and until the debt that is being secured is 'lost.' " Petitioners' Brief at 20.

Respondent urges that Joanne was aware of her *potential injury* when she learned that her payments from Vincent were in jeopardy. Specifically, Respondent Brown suggests that Joanne became "aware of the extent of potential damage by May of 1989." Respondent Brown Answering Brief at 23. However, being aware of the potential damage is not sufficient to meet the injury requirement mandated by this Court in *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), a requirement characterized by the Ninth Circuit as an injury that amounts to a *"concrete financial loss." Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1310 (9th Cir. 1992) (emphasis added), *cert. denied*, 507 U.S. 1004 (1993).

Respondent Brown also points to Vincent's preliminary discharge on May 4, 1988, as another point when Joanne would have known the extent of her potential damage. Respondent Brown's Brief at 24. Yet again this event did not cause Joanne a RICO injury because she was not at that point compelled to accept less than 100% of her pre-existing debt and because the determination of Vincent's legal obligation was not final. The preliminary discharge was granted on May 4, 1988, as an automatic statutory requirement because none of the creditors objected to Vincent's filing within the time allotted. *See Siragusa v. Siragusa*, 843 P.2d at 809; *see also* 11 U.S.C. § 727(a); Fed. R. Bankr. P. 4004.

Such a discharge, however, remains subject to revocation *for one year* by a creditor or Trustee upon proof that the discharge was obtained by fraud and the moving party did not know of the fraud at the time of discharge. 11 U.S.C. § 727(e). Less than a year later, on May 2, 1989, Joanne and the Trustee filed their adversary complaint in Bankruptcy Court seeking revocation of Vincent's discharge for fraud. (J.A. 186). From that point on, Joanne and the Trustee sought to untangle the defendants' various fraudulent transfers and to effect the return of the property to the Bankruptcy Estate. As the Second Circuit recognized in *Bankers Trust*, a RICO cause of action cannot be said to have accrued in such a situation.

Notably, Respondent Brown's Answering Brief is silent with respect to the Second Circuit's decision in *Bankers Trust*, 859 F.2d 1096. The defrauded creditor in *Bankers Trust* faced nearly the exact same circumstances as Joanne has faced in the instant case. Moreover, the creditor in *Bankers Trust* already had accepted a Chapter 11 Reorganization Plan, agreed to receive only 17.5% of its debt, and agreed to relieve the debtor of its remaining debt obligation. *Id.* at 1098. When it learned of evidence of fraudulent transfers, the creditor moved in Bankruptcy Court to revoke the reorganization plan on the ground that it had been obtained by fraud. *Id.* at 1099.

The reopened Bankruptcy Proceeding meant that the creditor's debt had not been finally "lost," and the question of a RICO injury was, therefore, found to be speculative. *Id.* at 1106. In light of these facts, the court held as follows:

> [A]fter the claims . . . are dealt with by the bankruptcy court – through recovery of all or part of [the fraudulently transferred corporate] assets, an order of abandonment, or some other final disposition of the lost-debt claims – [plaintiff's] injury will be ascertainable, an action as to the injury will accrue, and [plaintiff] will then have four years to bring a civil RICO action to recover the damages it has suffered in this area, subject of course to the normal rules and procedures governing such claims.

Bankers Trust, 859 F.2d at 1106. In short, the Second Circuit concluded that the creditor had not yet suffered a RICO injury since the Bankruptcy Proceeding was still open and the Trustee was attempting to recover fraudulently transferred assets.

2. Respondent Beckley, Singleton argues that two settlements within the Bankruptcy Proceeding have rendered the RICO case moot or have fully compensated Joanne for her RICO injury. Neither assertion is correct.

Respondent asserts that a settlement between Joanne, the Trustee, and Vincent, renders moot Petitioner's RICO case. Respondent Beckley, Singleton Brief at 2-3. This argument, however, ignores the clear terms of the Settlement Agreement – a Settlement Agreement that Respondents Beckley, Singleton, Delanoy, Jemison & List themselves attached to their brief as an appendix.

In the summer of 1994, Joanne and the Trustee entered into a comprehensive settlement agreement with Vincent that, subsequently, was approved by the Bankruptcy Court. Respondent Beckley, Singleton Brief, Appendix pp. 1-53. Vincent agreed to pay Joanne

$160,000 toward his alimony arrearage obligations and agreed to pay to the Bankruptcy Estate $40,000 toward its claims in the Adversary Proceeding. In return, Joanne released any personal claims against Vincent (other than future alimony claims), and the Bankruptcy Estate released its claims against Vincent. As part of the agreement, Vincent agreed to have his preliminary discharge revoked. App. at 20, 21.

The Settlement Agreement, however, explicitly preserved Joanne's right to receive payment against the Bankruptcy Estate for her pre-existing debts, as follows:

> B. The Releases by Joanne shall not extend or operate with respect to any claims by Joanne against the Bankruptcy Estate, including without limitation Joanne's Proof of Claim, all of which such claims by Joanne shall survive against the Bankruptcy Estate.

App. at 17. Moreover, the settlement explicitly preserved both Joanne's and the Estate's rights to proceed against the Respondents, by providing that the releases "shall not extend to or operate in favor of [the Respondents]." App. at 16.

In short, the settlement left Joanne in much the same position she had been in since Vincent filed his Chapter 7 Bankruptcy petition in 1987. Vincent's personal obligation to Joanne may have been extinguished, but Joanne's right to collect from Vincent's Bankruptcy Estate on the pre-existing debt remained. At the moment of Vincent's filing, a Bankruptcy Estate was created comprised of all of Vincent's property, "wherever located and by whomever held. . . . " 11 U.S.C. § 541. A Trustee was then appointed to "collect and reduce to money the property of the estate." 11 U.S.C. § 704. This money ultimately

would be distributed to those creditors who had filed timely proofs of claim. 11 U.S.C. §§ 501, 726. Joanne's settlement with Vincent left her awaiting payment of her pre-existing debt from the funds collected by the Trustee belonging to the Bankruptcy Estate.[1]

3. Respondent Brown contends that because Joanne and the Bankruptcy Estate have received settlement funds from Vincent and from others in an amount that may exceed the value of Joanne's property settlement, her potential loss has been fully recovered and, thus, she has suffered no concrete injury. Respondent Brown Answering Brief at 28-30. Consequently, Respondents argue, Joanne is unable to maintain a RICO cause of action.

It is impossible at this point to determine whether the two settlements referenced by Respondents cover Joanne's injury. As discussed *supra*, the settlement with Vincent had two components: payment to Joanne for alimony arrearages and a payment into the Bankruptcy Estate. The adversary complaint against Vincent which was settled included several state and federal causes of action and requests for relief, including one for punitive damages and one for costs. (JA 210, 216). The settlement with other

[1] Joanne's non-alimony release of Vincent in the 1994 Settlement Agreement, far from rendering the RICO case moot, may in fact represent the first incidence of the type of "concrete financial loss" necessary to maintain the RICO action. *Imagineering*, 976 F.2d at 1310. If Joanne can demonstrate in the RICO action that Vincent's inability to pay her more than the settlement amount was as a result of the Respondents' racketeering activity, then the accrual of her RICO cause of action began at the earliest in 1994 at the time of the settlement.

defendants in the adversary complaint proceeding, referenced in Respondent Brown's Brief at 29 but not placed into the record, suffers from some of the same attributes: some of the funds were paid to the Bankruptcy Estate based on various causes of action and requests for relief.

The effect of either settlement on Joanne's RICO claim cannot at this point be determined. At this point it is impossible to determine how much Joanne will receive from Vincent's Bankruptcy Estate once the expenses of the estate are paid, 11 U.S.C. § 330, and in conjunction with distributions to any other creditors, 11 U.S.C. § 726.

Second, since Joanne's RICO damages will be trebled pursuant to 18 U.S.C. § 1964(c), any previously received payments deemed to be compensatory, whether from direct settlements or from the estate, will be subtracted from the trebled amount. *See, e.g., United States v. Bornstein*, 423 U.S. 303, 314 (1976); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). Thus, Respondents' argument that Joanne has at this point been fully compensated for her RICO injury is without merit.

II. THE "INJURY AND PATTERN DISCOVERY" ACCRUAL RULE IS REQUIRED BY THE CIVIL RICO STATUTE AND BY GENERAL PRINCIPLES OF ACCRUAL

Respondents and their amici cite numerous judicial opinions discussing the purposes served by statutes of limitations. Yet there is no dispute that RICO has a statute of limitations and that the limitations period is four

years. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987). Rather, the issue before the Court here is when does the statute of limitations period begin to run. As to this accrual question, the Respondents' discussion of statutes of limitations adds nothing.

In their briefs, the Respondents completely ignore the civil RICO statute itself because the language and structure of the statute plainly argue for an accrual rule where the limitations period does not begin to run until a plaintiff knows or should have known both her injury *and* that her injury was the result of a pattern of racketeering. The Respondents also fail to discuss the accrual rules adopted by this Court and the lower courts in federal fraud and continuing violations cases, even though civil RICO actions closely resemble these types of cases. Respondents, instead, argue that this Court should be guided by the antitrust rule for accrual. The accrual rule developed under the Clayton Act is an anomaly unique to antitrust law and does not even contain the "discovery" requirement applied in all other federal statutes. Because having the limitations period run upon discovery of injury and a pattern of racketeering is the only rule consistent with the RICO statute and the circumstances faced by civil RICO plaintiffs, the decision of the court of appeals should be reversed.

1. It is striking that Respondents and their amici do not even attempt to address the language and structure of RICO. The reason for this omission is clear: the language and structure of the statute compel the "injury and pattern discovery" rule. The crux of a civil RICO cause of action is that a plaintiff must demonstrate a series of

predicate acts constituting a pattern of racketeering activity. "[T]he heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Agency Holding Corp.*, 483 U.S. at 154 (emphasis in original). The "pattern of racketeering" concept was the new approach to fighting organized criminal activity which lies at the core of the RICO statute.

Contrary to the concern about "stale claims" expressed by Respondents, the RICO statute also provides that courts accept evidence relating to racketeering activity that is up to ten years in the past. 18 U.S.C. § 1961(5) of the RICO statute defines a "pattern of racketeering activity" as at least two predicate acts of racketeering activity, "the last of which occurred within ten years . . . after the commission of a prior act of racketeering." Congress plainly believed that attacking criminal activity took precedence over a defendant's concern about stale evidence. The restrictive "injury discovery" accrual rule conflicts with Congress' clear intent to allow plaintiffs to introduce evidence relating to older remote acts. "It would be inconsistent with this breadth of definition for us to state that we will look to the past ten years to see if a civil RICO claim exists but if we find ten years of racketeering activity, all related and all perpetrated by the same defendants, we will provide a remedy only to those who were victimized within the past four years." *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1132-33 (3d Cir. 1988).

In enacting RICO, Congress also understood that the criminal activity that the statute was attacking would be difficult to root out. The statute, through its "enterprise"

element and other provisions, was aimed at the infiltration of legitimate businesses for criminal ends. *See United States v. Turkette*, 452 U.S. 576, 591 (1981). For this reason, the statute listed numerous fraud-related crimes as the predicate acts constituting a pattern of racketeering.[2] In the typical RICO case, a plaintiff must uncover not one, but at least two, underlying frauds which are part of a pattern and which are being perpetrated by a seemingly legitimate business or union. Given the difficulty inherent in developing such a civil RICO claim, the "injury and pattern discovery" rule is superior in that it provides a less restrictive standard for victims of RICO schemes and links the accrual of the action to discovery of the RICO pattern.

2. Respondents and their amici also fail to explain why the accrual rule for federal fraud cases is not the most appropriate rule here. As noted above, most RICO actions are based on fraud as the predicate acts. In addition, the prototypical RICO scheme is in essence a complex fraudulent scheme whereby a legitimate business or union enterprise is infiltrated and operated for illicit ends. The federal fraud accrual rule therefore is highly relevant to the civil RICO context. The federal fraud accrual rule is not "injury discovery." Rather, in federal fraud cases, the limitations period commences only after the plaintiff discovered or should have discovered the fraud itself. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397

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[2] *See* 18 U.S.C. § 664 (embezzlement from pension and welfare funds); 18 U.S.C. §§ 891-894 (extortionate credit transactions); 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 1954 (unlawful welfare fund payments).

(1946) (and cases cited at Pet. Br. 31-32, 37).[3] A comparable rule would require that the limitations period begin to run only after the civil RICO plaintiff had or should have discovered the RICO violation, *i.e.*, the pattern of predicate acts constituting the RICO offense.

Respondents and their amici also never address this Court's prior decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In *Havens Realty*, the Court ruled that a pattern of "continuing violations" of the Fair Housing Act should be treated differently than one discrete act of discrimination. *Id.* at 380. As a result, the *Havens Realty* Court and various courts of appeals have applied an expansive view of accrual for such continuing violations. *See* Pet. Br. 37-39. Because civil RICO with its pattern requirement also is a "continuing violation" statute, *see H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240-42 (1989), the "injury and pattern discovery" rule is similarly more appropriate than the restrictive rule adopted by the court of appeals here.

3. Respondents and their amici err in suggesting that the civil RICO statute should be governed by the accrual rule for antitrust claims under the Clayton Act. This argument for the Clayton Act accrual rule is grounded on a flawed premise. According to this argument, "fundamental statute-of-limitations principles compel adoption of the Clayton Act accrual rule, which

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[3] "[T]he decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." *Bailey v. Glover*, 88 U.S. 342, 348 (1874).

embodies no 'discovery' requirement." Am. Honda Br. 2. Yet, contrary to the contentions of Respondents and their amici, *see id.* at 3-10, the fundamental principle adopted by the federal courts in interpreting federal statutes is the very "discovery rule" that the Clayton Act rejected. That the "discovery" rule is the general rule for all federal statutes is stated clearly in the same treatises from which Respondents and their amici so selectively cite:

> The general rule applicable to federal statutes of limitations is that the limitations period begins to run when the claimant discovers or in the exercise of reasonable diligence should have discovered the acts constituting the alleged violation.

54 C.J.S. *Limitations of Actions* § 87, at 125 (1987). *See also* 2 Calvin W. Corman, *Limitation of Actions* § 1.11.1, at 134 n.3 (1991); Pet. Br. 39 n.19. As a commentator heavily relied on by amici (Am. Honda Br. 4-5) states about the use of the discovery rule,

> [t]his approach to the time of accrual of private civil RICO actions . . . applies the general federal rule of accrual (that is, the discovery rule).

Corman, *supra*, § 6.5.5 at 449. Thus, even though the Clayton Act's accrual rule lacks a discovery rule, "[e]very court that has considered an accrual rule for civil RICO has adopted some sort of discovery rule." *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992).

In addition, the Clayton Act accrual rule does not require that the plaintiff have knowledge of the factual predicate of his claim. *See* Pet. Br. 34-36 (discussing *United States v. Kubrick*, 444 U.S. 111 (1979) and subsequent lower court decisions requiring this knowledge). Nor

does the Clayton Act accrual rule require that the plaintiff have knowledge of who inflicted the injury. Pet. Br. 36-37 (same). Accordingly, the restrictive Clayton Act accrual rule is aberrant, conflicting with general federal accrual principles. As such, it is an inappropriate model for the civil RICO statute.[4] *See also Granite Falls Bank v. Henrikson*, 924 F.2d 150, 152-53 (8th Cir. 1991).

4. Respondents and their amici also promise that the anomalous and indefensible outcomes arising under an "injury discovery" rule can be prevented by assorted tolling principles. According to this view, courts will intervene to avoid bad results through some conglomeration of equitable tolling, fraudulent concealment, separate accrual and other doctrines. However, there is little agreement among the lower courts as to how and when these doctrines are to be applied.[5] To relegate the parties

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[4] Respondents and their amici point to *Agency Holding Corp.*, where the Court looked to the Clayton Act's four year statute of limitations for the civil RICO limitations period. However, respondents have put forward no explanations as to why the Clayton Act accrual rules also must be borrowed. In fact, the *Agency Holding* Court plainly concluded that the limitations period and the accrual rule were not integrally tied together when it expressly declined to reach the accrual issue. In *Agency Holding*, the Court chose between the multiple state statute of limitations and the Clayton Act's four-year limitations period and ruled that a uniform four-year period was fair and reasonable. Here, the Clayton Act accrual rule is unduly restrictive and contrary to general federal accrual principles.

[5] *See, e.g., McCool v. Strata Oil*, 972 F.2d at 1465 (noting that only some of the courts of appeals apply the "separate accrual" rule to civil RICO claims and declining to decide whether some form of equitable tolling "delay[s] the running of the RICO limitations period while a victim diligently investigates the

and courts in civil RICO lawsuits to these vague doctrines is fundamentally unfair and a recipe for disaster. Moreover, reliance on these various tolling and other doctrines as a primary means of resolving accrual issues defeats the very goal of uniformity and predictability which this Court sought to achieve in *Agency Holding*, 483 U.S. at 154.

5. Finally, Respondents and their amici maintain that the "injury and pattern discovery" rule should be rejected because it would allow a plaintiff "to slumber on his rights without investigating whether the defendant has committed a pattern of racketeering activity." Respondent Beckley, Singleton Brief at 13. This argument misconstrues the rule advocated by Petitioners. Under the "injury and pattern discovery" rule, the action begins to accrue "as soon as the plaintiff discovers, or *reasonably should have discovered*, both the existence and source of his injury and that the injury is part of a pattern." *Association of Commonwealth Claimants v. Moylan*, 71 F.3d 1398, 1402 (8th Cir. 1995) (emphasis added). Therefore, if a civil RICO plaintiff sits on her rights or is otherwise less than diligent in investigating and bringing her action, the courts will dismiss the action on limitations grounds since the injury and pattern "reasonably should have been discovered" with the statutory period. *See, e.g., Agristor Financial Corp. v. Van Sickle*, 967 F.2d 233, 240-42 (6th

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possible existence and extent of a pattern of racketeering"); *Rodriguez v. Banco Central*, 917 F.2d 664, 667 (1st Cir. 1990) (declining to resolve applicability of tolling rules to civil RICO accrual); *Bankers Trust*, 859 F.2d at 1104 (stating, without explanation, that "the standard tolling exceptions apply").

Cir. 1992) (dismissing civil RICO action because plaintiff should have discovered injury and pattern within statutory period); *Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619-20 (6th Cir. 1994) (same); *Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 238-39 (8th Cir. 1996) (same); *Schrag v. Dinges*, 150 F.R.D. 664, 679 (D. Kan. 1994), *aff'd*, 73 F.3d 374 (10th Cir. 1995) (same).

In the instant case, it is clear that Petitioners were not slumbering on their rights. Joanne Siragusa aggressively pursued Vincent Siragusa for the monies rightfully due her, bringing numerous actions in state court and in the federal bankruptcy court. However, despite all of her efforts, not until December 1990 did Joanne Siragusa first learn that Dr. Heeren also had been the victim of various related fraudulent reorganizations and that attorney Patricia Brown had been a principal architect of these unlawful schemes. Joanne Siragusa filed her civil RICO lawsuit within four years of learning that hers was not an isolated case but instead was part of a pattern of racketeering activity engaged in by Patricia Brown and others. It would be grossly unfair, as well as contrary to the language, structure and policies of the civil RICO statute, to apply the restrictive accrual rule of the court below. Instead, this Court should adopt the "injury and pattern discovery" accrual rule which would allow Joanne Siragusa to obtain redress for her injuries and which would prevent Respondent's conduct from going unpunished.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

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NO. 95-1723

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA AND JOANNE SIRAGUSA, Petitioners

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., AND BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD., Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PLAINTIFFS' EXECUTIVE COMMITTEE, MDL NO. 1069, AND OF DAVID S. FORBES, ET AL

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NO. 95-1723

IN THE
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Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PLAINTIFFS' EXECUTIVE COMMITTEE, IN RE AMERICAN HONDA MOTOR CO., INC. DEALERSHIPS RELATIONS LITIGATION MDL NO. 1069 AND OF DAVID S. FORBES, ET AL

Pursuant to Rule 37 of the Rules of this Court, Plaintiffs' Executive Committee, *In Re American Honda Motor Co., Inc. Dealerships Relations Litigation, MDL No. 1069* ("Plaintiffs' Executive Committee"), along with David S. Forbes, et al, respectfully move the Court for leave to file a brief *amicus curiae* in the above entitled case. Counsel for Respondents has declined movants' request for consent; the

Petitioners have granted their consent. The appropriate letters are on file with the Clerk.

INTEREST OF AMICI

A. *Plaintiffs' Executive Committee, Honda Litigation*

Plaintiffs' Executive Committee represents Honda and Acura dealers against American Honda Motor Co., Inc. and its affiliates and co-conspirators (collectively, "Honda") in a multi-district RICO action, pending in the United States District Court for the District of Maryland, MDL No. 1069.

From approximately 1979 until at least 1992, Honda participated in a massive bribery scheme in which certain Honda dealers paid kick-backs to Honda executives in return for more salable cars and the award of lucrative Honda dealerships. In 1991, a former New Hampshire Acura dealer suing Honda over his termination unearthed evidence that his competitor was bribing Honda executives in return for favored treatment. The United States District Court for the District of New Hampshire referred the matter to the United States Attorney for that District. The United States Attorney's investigation resulted in the largest commercial bribery prosecution in the nation's history. Two American Honda officers, one of whom was also a director, have been convicted, and nearly two dozen more have pled guilty to racketeering in connection with the bribery scheme.

The United States Attorney for the District of New Hampshire issued the first of the indictments against Honda executives in March, 1994. After the indictments became public, other Honda dealers began to bring claims, including RICO claims, against Honda and others. These claims are now pending as multi-district litigation in the District of Maryland.

B. *David S. Forbes, et al*

David S. Forbes and others are the named plaintiffs in a RICO class action, pending in the Eastern District of Pennsylvania, on behalf of all professional hockey players who played for the National Hockey League ("NHL") between 1975 and the end of 1991. During this 16-year period, R. Alan Eagleson, formerly the executive director of the hockey players' union, the National Hockey League Players' Association ("NHLPA"), received a continuous stream of bribes from the team owners. The bribe scheme centered around a series of international hockey tournaments organized by Eagleson, with cooperation from the team owners, beginning in the mid-1970's. The bribes brought Eagleson and the NHLPA under the owners' control so that they could keep the union weak and deprive players of the tools necessary effectively to negotiate their individual compensation. As a result, players were perennially underpaid, and over the 16-year period, suffered hundreds of millions in lost compensation, most of which resulted in increased profits to the owners and some of which found its way into Eagleson's pocket.

Eagleson left office as NHLPA executive director on December 31, 1991. Although some players, by the late 1980's, began to ask for financial data about the tournaments, not until Eagleson was indicted in a criminal RICO action in the District of Massachusetts in 1994 for embezzlement from the NHLPA, did the players have an understanding and confirmation of his racketeering. Suit was filed on November 7, 1995.

C. *Interest in This Petition*

In Re American Honda Motor Co., Inc. Dealerships Relations Litigation and *Forbes v. Eagleson* are intertwined with RICO's roots as a criminal statute, and highlight RICO's purpose of providing broad remedies for the victims of racketeering.

Amici's interest is predicated on the substantial and far-reaching consequences that any decision here will have on those victims of racketeering whose perpetrators were successful, as part of the scheme itself, in concealing their pattern of racketeering. In contrast to *Grimmett*, the racketeering patterns pled by *amici* continued for over a decade, and resulted in numerous criminal RICO indictments and convictions. *Amici* believe that the Court would benefit from the opportunity to examine a civil RICO accrual rule in this context. Finally, *amici* will argue that this Court should adopt the "last predicate act" rule of accrual espoused by the Third Circuit Court of Appeals, a rule which apparently has not been advocated by either party.

CONCLUSION

For the above stated reasons, Plaintiffs' Executive Committee and David S. Forbes, et al respectfully urge the Court to grant this motion for leave to file the accompanying amicus brief in the present case in support of reversal of the decision of the Ninth Circuit Court of Appeals.

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BRIEF AMICUS CURIAE OF PLAINTIFFS' EXECUTIVE COMMITTEE, IN RE AMERICAN HONDA MOTOR CO., INC. DEALERSHIPS RELATIONS LITIGATION MDL NO. 1069, AND DAVID S. FORBES, ET AL.

INTEREST OF AMICI CURIAE

1. Plaintiffs Executive Committee, Honda Litigation

Plaintiffs Executive Committee, *In re American Honda Motor Co., Inc. Dealer Relations Litigation, MDL 1069*, represents approximately 50 Honda and Acura dealers who have brought racketeering actions against American Honda, Honda North America, Honda Limited (the Japanese parent of American Honda), and numerous Honda executives, employees and non-Honda employee co-conspirators. All of these cases have been referred by the Judicial Panel on Multi-District Litigation to the United States District Court for the District of Maryland.

These cases stemmed from a civil case brought in the United States District Court for the District of New Hampshire by a terminated Acura automobile dealer. In February, 1993, after hearing evidence of bribery in that case, *Nault v. American Honda Motor Co.*, D. N.H. No. 89-384M, the United States District Court for the District of New Hampshire (McAuliffe, J.) referred the matter to the United States Attorney for that District. Investigation by the United States Attorney resulted in 13 indictments of Honda employees in March, 1994.

The indictments alleged that the defendant executives

of American Honda had engaged in a kickback and bribery scheme between 1979 and 1992 to accept bribes from certain Honda and Acura dealers in exchange for franchises, increased allocation of cars, and favorable treatment. The criminal case against the Honda executives was described by the press as the largest commercial bribery case in United States history (*Los Angeles Times*, August 22, 1995, p. D6).

Dealers injured by the bribe-based allocation system brought suit in a variety of federal district courts alleging violations of Racketeer Influenced and Corrupt Organization ("RICO"), the Robinson-Patman Act, the Auto Dealers Day in Court Act, breach of contract, and various state law claims. In August, 1995, the Panel on Multi-District Litigation referred these cases to Chief Judge J. Frederick Motz of the United States District Court for the District of Maryland.

The Honda defendants in this civil action have indicated their intent to file motions to limit liability based upon statute of limitation rules, akin to the rule applied by *Grimmett v. Brown*, 75 F.3d 506 (9th Cir. 1996). Plaintiffs have little doubt that such motions will be unsuccessful, because they believe the court will, after extensive evidentiary hearings, find that fraudulent concealment, equitable tolling and equitable estoppel prohibit assertion of such a defense. However, in an effort to eliminate this further expense and delay in obtaining a remedy, the plaintiff *amici* appear in this litigation to urge this Court to adopt the sound civil RICO accrual rule of *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988).

II. David S. Forbes, et al

Forbes v. Eagleson, E.D. Pa. Civ. No. 95-7021, is a RICO class action on behalf of all professional hockey players

who played for NHL teams from 1975 through 1991. The defendants include R. Alan Eagleson, former executive director of the hockey players' union, the National Hockey League Players' Association ("NHPLA") and the NHL team owners. The complaint alleges that from 1975 through 1991, Eagleson received a continuous stream of bribes, in violation of 29 U.S.C. § 186, from team owners. The owners controlled Eagleson through these bribes, thereby keeping the union weak and the players perennially underpaid.

The bribe scheme centered around a series of international hockey tournaments organized by Eagleson beginning in the mid-1970's. The tournaments included all-star teams from Canada and the United States made up of many of the best NHL players. Eagleson convinced the NHL owners to allow the players, otherwise prohibited by their contracts from playing outside the NHL, to play in the tournaments. He also persuaded the players, to whom he was a fiduciary and over whom he exercised virtual total control, to play in the tournaments. Year after year, the owners permitted Eagleson to control the tournaments' finances on their behalf. It is now known that, at least until the end of 1991, Eagleson skimmed a substantial portion of the tournament profits himself.

During the entire time period from the mid-1970's until 1992, and indeed to the present, the owners either knew Eagleson was pocketing their money, or, in the alternative, even though they were on notice of his financial self-dealing, they never asked Eagleson for an accounting. In return, Eagleson sold out the players' interests at the labor bargaining table and in individual negotiations, causing the players hundreds of millions in lost compensation, most of which resulted in increased profits to the owners and some of which found its way into Eagleson's pocket.

As in most labor racketeering schemes, the bribe arrangement between the owners and Eagleson was sophisticated, subtle and secret. For that reason and because Eagleson ran the NHLPA with dictatorial control, intimidating the players from questioning his decisions, he and the owners were able to conceal the bribe scheme for years. It was not until 1994 that the District of Massachusetts issued a RICO indictment, in *United States v. Eagleson*, No. 94-10054-N17G, charging Eagleson with embezzling from the NHLPA, that the players had actual documentation of the bribe pattern.

Forbes v. Eagleson was filed in the Eastern District of Pennsylvania on November 7, 1995, within four years after Eagleson's resignation as Executive Director of the NHLPA. That Court (O'Neil, J.) denied the owners' motion to dismiss based on the statute of limitations, applying the civil RICO accrual rule of *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). *Forbes v. Eagleson*, E.D. Pa. Civ. No. 95-7021 (July 23, 1996). *Amici* urge that the same rule be adopted by this Court.

SUMMARY OF ARGUMENT

RICO originated as a criminal statute which was designed to facilitate prosecutions of complex criminal organizations. RICO gives prosecutors many of the procedural and evidentiary advantages they wield in prosecuting conspiracies. Chief among these is a statute of limitations which does not accrue until the last overt act is committed in furtherance of the RICO enterprise. *See* Part I,A.

RICO is also a remedial statute. RICO's civil remedies were designed to empower civil plaintiffs as private attorneys general to "fill prosecutorial gaps" in bringing racketeers to

justice. In light of this intent, these plaintiffs should be given a statute of limitations accrual comparable to that provided to prosecutors of criminal racketeering. *See* Part I,B.

Keystone Insurance Co. v. Houghton, 863 F.2d 1125 (3d Cir. 1988) held that a civil RICO claim accrues when plaintiff knew or should have known of the last predicate act in the RICO pattern. This rule most closely embodies Congress' intent in giving civil plaintiffs quasi-prosecutorial remedies against racketeering. The *Keystone* rule also is appropriate because it allows a RICO victim to recover for all injuries caused by a pattern of racketeering, even those occurring prior to the limitations period. Finally, *Keystone* is unlikely to reward dilatory plaintiffs. Rather, it will ease the judicial task by dispensing with the lengthy and fact-intensive hearings, necessary to address tolling under other accrual rules. For these reasons, *Keystone* is appropriate as a national rule of civil RICO accrual. *See* Part II.

The accrual rule espoused by *Grimmett* does not give civil plaintiffs adequate opportunity to discover the critical "pattern" of racketeering. A pattern of racketeering may take years to occur, let alone be discovered and pled with sufficient particularity to satisfy Fed. R. Civ. P. 9(b). If plaintiffs are held to a rule whereby their RICO claim accrues at the first knowledge of injury, then a RICO claim could be time barred before it even exists. *See* Part III,A.

The pattern is too essential to a RICO claim, and the inequity of an accrual rule that gives it short shrift is too glaring, to be cured by a separate tolling doctrine. Reliance on a tolling rule will result in lower courts' unnecessarily being forced to decide complex legal and factual issues to determine whether any RICO claim can proceed. *See* Part III,B.

Nor does the Clayton Act furnish the proper model for accrual of a RICO claim. A claim accrues under the Clayton Act upon each discrete injurious act. An accrual rule framed upon singular, discrete acts cannot govern RICO claims, which by their nature must allege a continuous spectrum of related acts. Further, the Clayton Act's restriction against claims reaching back more than four years before a timely complaint is the antithesis of Congress' intent that RICO enable persons to recover for injuries caused by long patterns of racketeering activity. *See* Part III,C.

The Third Circuit's accrual rule most effectively reflects RICO's criminal history and its remedial goals, and *amici* urge this Court to adopt it.

ARGUMENT

I. RICO's Purpose Supports an Expansive Rule of Accrual

A. RICO Originated as a Criminal Statute

Definition of civil RICO's statute of limitations rule of accrual must begin with an examination of the statute's criminal origins. RICO represented an entirely different model of understanding and combating crime. The traditional model was to investigate crime on an occurrence-by-occurrence basis, and to prosecute and incarcerate the perpetrator of each individual crime. In order to account for crime's increasing organization and complexity, RICO identifies crimes described as "a course of conduct involving relationships with criminal groups rather than as a single moral act." Lynch, *RICO: The Crime of Being a Criminal* (pts. 3 & 4), 87 Colum.L. Rev. 920, 952-53 (1987).

Along with this change in focus, RICO endows prosecutors with powerful advantages. These include forfeiture of the defendants' interest in the racketeering enterprises, 18 U.S.C. § 1963(a), the psychological prejudice of answering to the pejorative charge of "racketeering", and extension of the statute of limitations for as long as the defendant commits predicate acts in furtherance of the enterprise. *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988), 100 L. Ed.2d 277, 108 S. Ct. 1996 (1988); *United States v. Pepe*, 747 F.2d 632, 633, n. 55 (11th Cir. 1984).

These advantages have not gone uncriticized. The criticism of the latitude bestowed by RICO on prosecutors, *see* B. Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Fordham L. Rev. 165 (1980), is reminiscent of the debate earlier in this century over conspiracy prosecutions, the original "darling of the prosecutor's nursery". *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (L. Hand, J.).

The advantages which made conspiracy the darling of the prosecutor's nursery were abundant. Venue in a conspiracy case is proper wherever any overt act is committed. *Hyde v. United States*, 225 U.S. 347, 360-64, 56 L. Ed. 1114, 32 S. Ct. 793 (1912). The scope of the conspiracy may be inferred from circumstantial evidence. *Blumenthal v. United States*, 332 U.S. 539, 549, 91 L. Ed. 154, 164, 68 S. Ct. 248 (1947). Hearsay in furtherance of the conspiracy is admissible against co-conspirators. *Krulewitch v. United States*, 336 U.S. 440, 443, 93 L. Ed. 790, 794 , 69 S. Ct. 43 (1949). The jury hearing this evidence is already inclined to believe, by the presence of several defendants in the courtroom, that "birds of a feather are flocked together." *Krulewitch, supra* at 454, 93 L. Ed. at 800. Thus, the demonstrated guilt of some defendants may "spill over" to others tried jointly. *Kotteakos v. United States*, 328

U.S. 750, 774-75, 90 L. Ed. 1557, 1571-1572, 66 S. Ct. 1239 (1946).

Tying together all of conspiracy's procedural and evidentiary advantages to prosecutors is a lengthened statute of limitations. The longer a conspiracy is deemed alive, the more of these advantages a prosecutor can claim. The statute of limitations in a criminal conspiracy does not run until the performance of the last overt act furthering the conspiracy. *Grunewald v. United States*, 353 U.S. 391, 404, 1 L. Ed.2d 932, 939, 77 S. Ct. 963 (1957); *Hyde v. United States*, 225 U.S. 347, 56 L. Ed. 1114, 1127, 32 S. Ct. 793 (1912).

The relaxed procedural and evidentiary rules available in prosecuting conspiracies led many to fear conspiracy's growth from darling of the nursery to maniacal schoolyard bully. *See, e.g., Krulewitch, supra* at 445-449, 93 L. Ed at 795-801 (Jackson, J. concurring, describing conspiracy as "that elastic, sprawling and pervasive offense."). Nevertheless, conspiracy prosecutions gained importance and acceptance. This acceptance was premised on the belief that the increased potency of a conspiracy prosecution and the lower barriers to conviction were commensurate with the increased threat posed by crimes forethought and coordinated by conspirators as compared to the same crimes randomly committed by independent individuals. *See, e.g., Callanan v. United States*, 364 U.S. 587, 593-94, 5 L. Ed.2d 312, 317, 81 S. Ct. 321 (1961); *Pinkerton v. United States*, 328 U.S. 640, 646, 90 L. Ed. 1489, 1496, 66 S. Ct. 1180 (1946).

The parallels to RICO are obvious. For that reason, looking to conspiracy law, courts in substantive criminal RICO cases start the limitations clock running at the defendant's last predicate act in furtherance of the enterprise. *United States v.*

Persico, 832 F.2d 705, 713-14 (2d Cir. 1987) *cert. denied*, 486 U.S. 1022, 100 L. Ed.2d 227, 108 S. Ct. 1996 (1988). A RICO conspiracy charge may be brought within five years after the conspirators have achieved or abandoned their purpose. *Id.*; *United States v. Torres Lopez*, 851 F.2d 520, 525 (1st Cir. 1988) *cert. denied* 489 U.S. 1021, 103 L. Ed.2d 204, 109 S. Ct. 1144 (1989). The defendant may be charged with predicate acts extending back the length of the enterprise as long as the last predicate act occurred within five years of the indictment. *Persico, supra*; *United States v. Vogt*, 910 F.2d 1184, 1195-96, (4th Cir. 1990) *cert. denied*, 498 U.S. 1083, 112 L. Ed.2d 1043, 111 S. Ct. 955 (1991). These cases all trace their reasoning to "continuing violation" criminal cases, which measure the limitations period from the point at which the crime is complete. *See, Persico, supra, citing Toussie v. United States*, 397 U.S. 112, 115, 25 L. Ed.2d 156, 90 S. Ct. 858 (1970). As demonstrated below, logic and sound policy dictate that this same accrual model should apply in civil RICO actions.

B. RICO is a Remedial Statute

In a portion of the statute that remains uncodified, Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes." Section 904(a) of Pub. L. No. 91-452, 84 Stat. 947. "The statute's remedial purposes are no where more evident than in the provision of a private action for those injured by racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98, 87 L. Ed.2d 346, 359-60, 105 S. Ct. 3275 (1985). RICO's power as a criminal statute and its expansive interpretation as a civil remedy are simply two edges to the same weapon against racketeering, since "[p]rivate attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps." *Sedima, supra* at 493, 87

L. Ed.2d at 357[1]. If civil plaintiffs are to act as private attorneys general in bringing racketeers to justice, they should be given a statute of limitations accrual which enables them to be as effective as prosecutors of criminal RICO.

Even a cursory review of legal history reveals a gradual divergence of the public and private consequences of criminal acts. The separation of public and private rights began to cause profound societal concern by the mid-1970's. By the end of the 1970's, the interest of victims of violent crime had come to the attention of the courts and the public. Victims' rights statutes, such as rape shield statutes, first protecting privacy interests, began to appear. In the last ten years, statutes which give victims input in the sentencing process itself were enacted by the Congress and in virtually every state. *See, e.g.*, 18 U.S.C. § 3553(7). RICO itself, and the evident Congressional intent to allow its expansive use in civil cases, reflects Congress' concern with the illegal use of aggregations of economic power and with providing a remedy to victims of crime. It would be patently inconsistent with the trend of vindicating crime victims to apply to RICO a restrictive accrual rule limiting the ability of injured parties to recover their damages.

Amici respectfully urge the Court to adopt the accrual rule which is truest to RICO's history as a criminal statute and to its self-consciously remedial purpose: that a civil RICO action accrues when plaintiff reasonably becomes aware of the enterprise's last overt act.

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[1] On July 2, 1996, the President signed into law the Anticounterfeiting Consumer Protection Act of 1996, 104 P.L. 153, 100 Stat. 1386. The Act strengthens the hand of private business against video and software piracy by, among other measures, making such piracy a RICO predicate act. This statute demonstrates the belief of both the Executive and Legislative branches in the continued necessity and vitality of civil RICO's remedial purposes.

II. The Third Circuit's "Last Predicate Act" Rule Promotes RICO's Purposes

A. *Keystone* Most Closely Embodies Congressional Intent

Keystone Insurance Co. v. Houghton, 863 F.2d 1125 (3d Cir. 1988) was one of the first cases from the Circuit Courts of Appeals decided after *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 154, 97 L. Ed.2d 121, 132, 107 S. Ct. 2759 (1987) to address the question left open by that decision, namely, when a civil RICO action accrues. It ruled:

> [T]he limitations period for a civil RICO claim runs from the date the plaintiff knew or should have known that the elements of the civil RICO cause of action existed unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity.

863 F.2d at 1130.

Keystone discerned in the statutory language and in this Court's opinions three essential themes in developing a civil RICO accrual rule. First, a civil RICO claim has several unique elements which differentiate it from a claim for the underlying predicate acts -- for example, the enterprise and the pattern -- and the discovery rule should apply to each one. 863 F.2d at

1130. Second, the nature of a RICO violation is such that Congress must have intended that it be treated as continuing, and is not likely to have intended the civil claim to accrue before the crime was complete. *Id.* at 1131. Finally, the Third Circuit took to heart Congress' mandate that RICO "shall be liberally construed to effectuate its remedial purpose." *Id.* at 1128, *citing* Organized Crime Control Act, Pub. L. No. 91-452 § 904(a), 84 Stat. 942, 947 (1970).

The *Keystone* rule is most true to Congress' intent to protect and empower the victims of racketeering because it ensures that plaintiffs (such as *amici*) will not be foreclosed from their claims while still unaware of them. *Keystone* simply allows defendants by their own continuing wrongful actions to postpone accrual of the cause of action that will remedy those wrongs. Not coincidentally, this accrual rule is the same applied in criminal RICO prosecutions, bringing to bear Congress' intent to allow civil plaintiffs to fight racketeering in situations where the Government for good reasons may decline to bring indictments.

The United States District Court for the District of Louisiana applied the *Keystone* rule in *Crowe v. Smith*, 856 F. Supp. 1178 (E.D. La. 1994). *Crowe* had the advantage of reviewing the decisions of the various Courts of Appeal which had addressed the issue in the seven years since *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 97 L. Ed.2d 121, 107 S. Ct. 2759 (1987). After careful analysis of these cases, and of the statutory language itself, *Crowe* decided that the *Keystone* rule best embodied the Congressional intent and the teachings of this Court. 856 F. Supp. at 1183[2].

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[2] *Crowe* declined to adopt *Keystone's* extension of the accrual date to the time of "further injury". 856 F. Supp. at 1183, n.14.

Crowe found controlling Congress' contemplation of a ten-year pattern of racketeering, *see* 18 U.S.C. § 1961(5), and the improbability that Congress would then provide a remedy only to those who were victimized within four years of their complaint. 856 F. Supp. at 1183, *quoting Keystone*, 863 F.2d at 1132-33. *Crowe* also recognized the need for an accrual rule that would accommodate RICO's unique pattern requirement, and the unfairness of a rule that would cut off RICO claims while the pattern was still being played out. 856 F. Supp. at 1182-83. *Amici* submit that this same analysis favors adoption of *Keystone* as the national civil RICO accrual rule, and urge this Court to do so.

B. *Keystone* Recognized the Importance of Capturing All Predicate Acts

Importantly, *Keystone* recognized that, once a complaint is deemed timely, the plaintiffs should be allowed to recover for injuries dating from the beginning of the pattern, even if those injuries are beyond the limitations period. 863 F.2d at 1183-33. Again, this holding is the result of careful examination of Congress' intent in enacting the statute. The Court recognized that 18 U.S.C. § 1961(5) requires of a pattern only that it consist of two predicate acts within ten years, and continued:

> It would be inconsistent with this breadth of definition for us to state that we will look to the past ten years to see if a civil RICO claim exists but if we find ten years of racketeering activity, all related and all perpetrated by the same defendants, we will provide a remedy only to those who were victimized within the past four years. To do so would encroach upon and limit a legislatively-enacted scheme to provide

recovery for racketeering injuries.

863 F.2d at 1133, *citing* 18 U.S.C. §§ 1961(5), 1964(c).

In coming to this conclusion, *Keystone* looked to other federal remedial statutes. For example, in sex discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, plaintiff has a 180 day statute of limitations before filing a complaint with the EEOC. However, plaintiff can recover for incidents occurring more than 180 days before her EEOC filing if she can demonstrate a pattern of discrimination, the last act of which occurred within the limitations period. *See, e.g.* Held v. Gulf Oil Co., 684 F.2d 427, 430 (6th Cir. 1982); *Acha v. Beame*, 570 F.2d 57, 65 (2d Cir. 1978).

In allowing this relation back, *Keystone* differs from Second Circuit cases which hold that a RICO plaintiff may recover from injuries discovered only during the four years preceding the timely complaint, regardless of the length of the racketeering pattern. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir. 1988), *cert. denied sub nom. Soifer v. Bankers Trust Co.*, 400 U.S. 1007, 104 L. Ed.2d 158, 109 S. Ct. 1642 (1989); *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995), *cert. denied sub nom. Steinberg v. Bingham*, ___ U.S. ___, 134 L. Ed.2d 543, 116 S. Ct. 1418 (1996). *See also State Farm Insurance Co. v. Amman*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J. concurring). However, these cases depend on the Clayton Act accrual rule, which, as discussed in detail below, is of limited assistance because it does not address the RICO pattern. *Keystone*, on the other hand, drew its rule from federal statutes which do contemplate patterns of wrongful conduct, including criminal RICO.

Allowing a complaint to capture a lengthy pattern of

wrongful conduct as long as some acts are timely alleged is not unknown in the application of remedial federal statutes. In addition to Title VII which is discussed above, the Fair Housing Act of 1968, 42 U.S.C. § 3612(a), specifically contemplates such relation back. Under that statute, plaintiff must file a suit within 180 days of the alleged discriminatory housing practice. However, if plaintiff can demonstrate a pattern of discrimination, the last act of which occurred within 180 days prior to filing suit, she may recover for damages arising out of the entire pattern. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81, 71 L. Ed.2d 214, 230, 102 S. Ct. 1114 (1982). "Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act...." 455 U.S. at 380, 71 L. Ed.2d at 230. *Havens'* rationale urges relation back in cases under RICO, a similarly broad and remedial statute.

Forbidding relation back would assume that Congress intended that criminals could be jailed for RICO violations for which they could not be sued, because those acts occurred too early in the pattern of racketeering to be timely under a civil plaintiff's complaint. One would have to find strikingly explicit support in RICO's language or history to accept this anomalous result; there is none. Instead, the statute's history and purpose, as noted above, are to give civil plaintiffs powers complementary to those of criminal prosecutors. The only reasonable conclusion from this history and purpose is to allow a civil RICO complaint to allege *all injurious acts* of the pattern, as long as one of those acts fell within the limitations period.

C. *Keystone* is Amenable to Practical Application

The *Keystone* rule is unlikely to raise the specter of knowledgeable plaintiffs' sitting on claims for decades while racketeering patterns are played out. As a practical matter, it is difficult to identify what incentive a knowledgeable plaintiff would have to sit on a claim. The lapse of time, bringing with it faded memories and lost evidence, most harms the plaintiff as the party with the burden of proof. Further, defendants may die or go out of business as time elapses. Of even greater importance than these practicalities, however, is that RICO plaintiffs by definition have been the victims of criminal acts. If a defendant continues, despite plaintiff's knowledge, to commit criminal acts up to within four years of the complaint, no policy is advanced by insulating that defendant from her earlier crimes. Statutes of limitation protect defendants from arguing over wrongs long past. Where the wrong is a continuous racketeering pattern of which the last acts are less than four years old, the balance of the equities favors the victim whose interest Congress sought to vindicate.

Keystone's commitment to vindicating RICO victims has not rewarded the dilatory or otherwise proved unworkable, as later Third Circuit RICO cases demonstrate. *See, e.g., Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991); *Arab African International Bank v. Epstein*, 10 F.3d 168, 174-75 (3d Cir. 1993); *Davis v. Grusemeyer*, 996 F.2d 617, 622-27 (3d Cir. 1993) (disallowing untimely RICO claims).

Indeed, a parsimonious accrual rule may force RICO actions to be filed hastily, without full investigation, by plaintiffs with a fearful eye on the statute of limitations bar. In any event, *Keystone* solves one immense practical problem

encountered by all of the other Circuits, namely, lengthy and expensive satellite litigation to determine how much plaintiff knew of her cause of action and when. Thus, practical as well as equitable considerations favor *Keystone's* adoption as the national civil RICO accrual rule, and *amici* urge this Court to do so.

III. The Accrual Rule Espoused By the Ninth Circuit Does Not Further RICO's Goals

A. Fair Play Counsels Against Accrual Before Plaintiff Is Aware of All of the Elements of Her Cause of Action

"[T]he heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 154, 97 L. Ed.2d 121, 132, 107 S. Ct. 2759 (1987) (emphasis in original). *See also H.J., Inc. v. Northwestern Bell*, 492 U.S. 229, 236, 106 L. Ed.2d 195, 206, 109 S. Ct. 2893 (1989) (describing and interpreting "RICO's key requirement of a pattern of racketeering"). No other criminal statute outlaws a "pattern" of any type of behavior. No other civil remedy requires that plaintiff demonstrate a "pattern" of anything. The concept of "pattern" is unique to, and defines, both civil and criminal liability under RICO.

Northwestern Bell established the now-familiar requirements of "continuity" and "relatedness" for pleading a RICO pattern. 492 U.S. at 238-39, 106 L. Ed.2d at 207-08. These requirements appropriately demand additional specificity in civil RICO complaints. Fairness dictates that if after *Northwestern Bell* a person wronged by racketeering must plead a pattern of continuous and related acts, that person must

be given sufficient time to discover this essential and unique ingredient of her claim. The Ninth Circuit, in declining to recognize this basic fairness, extinguished a claim under a remedial statute because Petitioners were not aware that the "heart" of their claim, the pattern, existed.

The inequity of the Ninth Circuit's decision is all the more striking in the context of Fed. R. Civ. P. 9(b), which requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Most RICO claims, including those of Petitioners and of *amici*, include as predicate acts mail, wire or securities frauds. Thus, several courts, including the Ninth Circuit, have applied Rule 9(b)'s requirement of particularity to the description of the pattern of predicate acts, such that plaintiff must identify the perpetrator, the recipient, the date, and the manner of each fraudulent act in the pattern. *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 196 (9th Cir. 1987). *Grimmett's* accrual rule whipsaws plaintiffs between the statute of limitations and Rule 9(b). By the time plaintiff has discovered the pattern of racketeering and is able to plead a RICO complaint to Rule 9(b)'s satisfaction, more than four years can easily have elapsed since she first felt an injury.

The facts presented by *amici* illustrate poignantly the inequity of the Ninth Circuit's decision. The Honda dealer plaintiffs allege that beginning in 1979, Honda as standard practice awarded scarce automobiles and lucrative Honda dealerships to dealers who paid kickbacks to Honda executives. Plaintiff dealers, like many fraud victims, were the last to know of this arrangement. All had difficulty getting their fair share of allocated Honda automobiles. Some went out of business. However, none of them could have come close to articulating a RICO complaint until the Government issued

RICO indictments revealing the staggering scope of the bribery conspiracy in March 1994.

Honda itself has argued that it did not know of, and had no reason to know of, the bribery conspiracy until a former Acura dealer from New Hampshire unearthed evidence of bribes in a civil suit in late 1991. Leaving aside the likelihood that a multibillion dollar international corporation with its finger on the pulse of the American automobile buying public was unaware that its entire American sales force was on the take, if Honda was unaware of the pattern of racketeering until 1992, then *a fortiori* plaintiff dealers could not have known of it at least until then.

Similarly, Eagleson was the union representative and thus the fiduciary to all of the players. He used his dominant rule to intimidate them from making any real inquiries or challenges to his conduct of the union's affairs. The few players who tried to find out about Eagleson's and the tournaments' financial particulars were repeatedly stonewalled. The players had every incentive to remove Eagleson and stop the bribe scheme had they known about it earlier. However, Eagleson was able to continue the scheme until the end of 1991, by concealing his actions from the players and refusing requests for financial disclosure.

Amici were not knowledgeable plaintiffs who sat on their rights for years. Had the Honda dealers filed RICO claims as soon as they noticed their difficulty in obtaining automobiles, or had the hockey players filed as soon as they suffered decreased pay and benefits, as the Ninth Circuit would have them do, they would have been subject to dismissal and possibly sanctions. At the time that they were aware of their economic losses, *amici* did not know, and could not plead

consistently with Fed. R. Civ. P. 11, that they were "injured", i.e., that the losses resulted from wrong doing. Defendants in both cases should not be allowed to escape liability for their years of criminal activity because they successfully suppressed knowledge of their crimes, only to tie up the courts years later over whether some plaintiffs should have been able to discover the scheme long before the United States Justice Department with all of its resources had enough information to indict.

Grimmett's injustice is cast in stark relief by this single fact. Indictments were brought against both the Honda executives and Eagleson in 1994, for racketeering acts which extend back into the 1970's. Adoption of the *Grimmett* rule, or even of the less restrictive rules which extend the accrual rule to the time the plaintiff knows or should have know of the pattern, *see*, *e.g.*, *Granite Falls Bank v. Henrickson*, 924 F.2d 150, 153 (8th Cir. 1990); *Bath v. Buskin, Gaims, Gaines & Jonas*, 913 F.2d 817 (10th Cir. 1990); *Bivens Gardens Office Buildings, Inc. v. Barnett Bank of Fla., Inc.*, 906 F.2d 1546 (11th Cir. 1990) *cert. denied* 500 U.S. 910, 114 L. Ed.2d 89, 111 S. Ct. 1695 (1991), will require *amici* to litigate issues of limitation of actions which the Government, in prosecuting the criminal cases, did not need to consider.

Such a result is manifestly inconsistent with the purposes of RICO. As Justice Brennan noted in *Sedima*, in holding that a prior conviction requirement would be inconsistent with the remedial purposes of RICO,

> Such a rule would severely handicap potential plaintiffs. A guilty party may escape conviction for any number of reasons -- not least among them the possibility that the Government itself

> may choose to pursue only civil remedies. Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps....This purpose would be largely defeated, and the need for treble damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice.

473 U.S. at 493, 87 L. Ed.2d at 357 (citations omitted).

At the sentencing hearing of the last Honda executive to appear before him, Chief Judge DiClerico of the United States District Court for the District of New Hampshire, who presided over the Honda criminal trial, expressed his concern that the president of American Honda, Koichi Amemiya, had not been brought before him. Amemiya is a defendant in the civil actions in *Honda Dealer Relations Litigation*. It would be patently inconsistent with the main current of RICO law for this Court to limit civil RICO actions, rather than allowing such actions to be brought to fill prosecutorial gaps.

B. Relying on a Tolling Rule Will Complicate the Judicial Task

Three tolling doctrines are applicable in most RICO cases which, by their very nature, involve fraud and concealment. *Equitable estoppel* is applicable where a defendant takes affirmative steps to prevent the plaintiff from suing in time. It is distinguished from *fraudulent concealment*, which presupposes that the plaintiff has discovered, or should have discovered, that the defendant injured him and "denotes efforts by the defendant -- above and beyond the wrongdoing upon which the plaintiff's claim is founded -- to prevent the

plaintiff from suing in time." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990). The third tolling doctrine is *equitable tolling*, which differs from *fraudulent concealment* in that it does not assume a wrongful effort by the defendant to prevent the plaintiff from suing. It differs from the discovery rule in that the plaintiff is assumed to know that he has been injured, "so that the statute of limitations has begun to run; but he cannot obtain the information necessary to decide whether the injury is due to wrongdoing, and if so, wrongdoing by the defendant." *Id.* at 451.

The lower courts which have, like *Grimmett*, held that a RICO cause of action accrues when the plaintiff discovers her injury, have recognized that such a rule is likely to cause injustice. The judicial response to the obvious injustice has often been a passing reference to these complex tolling doctrines as a panacea. For example, the Ninth Circuit acknowledged that "a court wishing to give a plaintiff who knows of her injury time to investigate a pattern can always toll the limitations period." *Grimmett*, at 512, *citing McCool v. Strata Oil Co.*, 972 F. 2d 1452, 1465 (7th Cir. 1992). In *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir. 1988), *cert. denied sub nom. Soifer v. Bankers Trust Co.*, 400 U.S. 1007, 104 L. Ed.2d 158, 109 S. Ct. 1642 (1989), the Court dismissed concerns that actions would be time barred with the statement that "[n]aturally, as with all rules of accrual, the standard tolling exceptions apply." *Rodriguez v. Banco Central*, 917 F.2d 664 (1st Cir. 1990) recognized that, where a plaintiff who knows of an injury from one predicate act in year one and learns of the second predicate act only in year six, application of the injury discovery rule could bar a RICO suit before it could be brought. The Court dismissed this concern, by reasoning that in Clayton Act cases, courts "have found the statutes *tolled* by fraudulent concealment." *Id.* at 668

(emphasis in original). The Court added "[o]ne can easily imagine the development of an analogous 'tolling' doctrine in RICO cases." *Id.*

Rodriguez was decided in 1990, only six years ago, but barely at the mid-point from the beginning of wide-spread use of the RICO statute, to the present. *Sedima*, 473 U.S. at 481 n.1, 87 L. Ed.2d 349 n.1, 105 S. Ct. 3275, 3278 n.1. In the last six years, RICO's use in civil actions has geometrically expanded and the courts' interpretation of the statute is constantly being refined. Less than 60 days ago, Congress amended the statute to expand the available predicate acts to include acts of copyright fraud, 104 P.L. 153, 100 Stat. 1386, demonstrating its belief in RICO's continuing vitality and necessity.

The solution to the potential injustice recognized by all of the lower courts who have considered application of an injury discovery rule is not to force lower courts to make nice determinations regarding fraudulent concealment, equitable estoppel, and equitable tolling. The doctrines are complex, intricate, and difficult. They will arise in nearly every RICO case because most RICO predicate acts involve fraud. Application of one of several tolling rules will require the District Courts to engage in complicated and time-consuming fact finding. Complicating the procedures to obtain the remedies available under RICO will primarily benefit the criminals who will escape liability for their acts. Such a result would be inconsistent with the clear language of the statute and the trend of the law to protect victims of crime.

On the other hand, a separate tolling rule is unnecessary if this Court adopts the accrual rule announced in *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). Tolling during the racketeering pattern is unnecessary under

Keystone because that pattern is already subsumed into its accrual rule. The only factual inquiry under *Keystone* is when the last predicate act occurred, and when plaintiff should have been aware of this last predicate act. This is the simplest factual inquiry required under any accrual standard. Thus, by dispensing with a separate tolling doctrine, a *Keystone* standard avoids the cumbersome satellite litigation and circuit splits which would arise under the *Grimmett* standard[3].

C. The Clayton Act Does not Provide an Appropriate Accrual Model

Agency Holding Corp. v. Malley-Duff Associates, 483 U.S. 143, 97 L. Ed.2d 121, 107 S. Ct. 2759 (1987) adopted from the Clayton Act a four-year statute of limitations for civil RICO claims. *Amici* do not dispute that the Clayton Act is the appropriate model for choosing the *length* of RICO's statute of limitations. However, key differences between the conduct proscribed by the two statutes, and the remedies available under them, undermine the Clayton Act's usefulness as a model for the *accrual* of a RICO action.

A claim accrues under the Clayton Act when a defendant commits an act that injures a plaintiff's business. *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 28 L. Ed.2d 77, 92, 91 S. Ct. 795 (1971). The Clayton Act treats multiple harmful acts by starting a new

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[3] Although *Davis v. Grusemeyer*, 996 F.2d 617 (3d Cir. 1993) addressed fraudulent concealment after *Keystone*, it appears to be the exception, rather than the rule. *See Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991); *Arab African Int'l Bank v. Epstein*, 10 F.3d 168 (3d Cir. 1993) (addressing civil RICO statute of limitations post-*Keystone*). *Amici* hockey players defeated in the Third Circuit a motion to dismiss based on the statute of limitations without lengthy examination of tolling doctrines. *Forbes v. Eagleson*, E.D. Pa. Civ. No. 95-7021 (7/23/96).

statute of limitations running at every act, but allowing plaintiff to recover only for acts and injuries occurring within four years of the complaint. *Id.*

This accrual rule does not take into account RICO's critical pattern element, which is absent from antitrust law. As *Zenith* demonstrates, each injurious act by an antitrust defendant creates a new and separate liability. However, a RICO plaintiff cannot make out a cause of action from one single injurious act. Since RICO requires plaintiff to plead a pattern, a concept which requires continuity, *H.J., Inc. v. Northwestern Bell*, 492 U.S. 229, 236, 106 L. Ed.2d 195, 206, 109 S. Ct. 2893 (1989), it should not import from the Clayton Act an accrual rule which is defined by discreteness.

Not every issue in civil RICO can be guided with a Clayton Act analog. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 87 L. Ed.2d 346, 105 S. Ct. 3275 (1985) reversed the Second Circuit's requirement of a "racketeering injury" which was derived directly from the Clayton Act's "antitrust injury". The inappropriateness of a Clayton Act accrual rule is most evident in the attempt to apply its corollary, the "continuing violation" rule. *Zenith, supra*, states this corollary as follows: "In the context of a continuing conspiracy to violate the anti-trust laws...each time a plaintiff is injured by an act of the defendants a cause accrues to him to recover the damages caused by that act and...as to those damages, the statute of limitations runs from the commission of the act." 401 U.S. at 338, 28 L. Ed.2d at 92.

Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1105 (2d Cir. 1988), *cert. denied sub nom. Soifer v. Bankers Trust Co.*, 400 U.S. 1007, 104 L. Ed.2d 158, 109 S. Ct. 1642 (1989) attempted to apply this rule in a RICO case. The court

concluded that plaintiff may only recover for damages discovered during the four years prior to the complaint, regardless of the length of the continuous pattern. 859 F.2d at 1103 (citation omitted). This rule is at odds with the rule of accrual in criminal RICO prosecutions, where the defendant may be charged with predicate acts going back to the inception of the racketeering enterprise, as long as one predicate act occurs within five years of the indictment. *United States v. Vogt*, 910 F.2d 1184, 1195-96, (4th Cir. 1990) *cert. denied*, 498 U.S. 1083, 112 L. Ed.2d 1043, 111 S. Ct. 955 (1991).

The *Bankers Trust* rule is unworkable, as demonstrated by the facts presented by *amici*. Both *amici* allege that a pattern of racketeering began in the 1970's and continued until the early 1990's. *Amici* alleged that they suffered injury during the entire duration of the racketeering conspiracy. Suits were brought in 1994 against the Honda executives and in 1995 against Eagleson and the NHL owners. Under *Bankers Trust*, *amici* will have to depend on complex tolling doctrines in order to reach the racketeering which occurred prior to 1990 or 1991, respectively. A Congress which recognized that "[m]ultiple injuries, spread over time, frequently result from the very nature of a RICO violation", *Bankers Trust*, 859 F.2d at 1103, and which put an expansive ten-year boundary around the concept of "pattern" in order to capture these multiple injuries, 18 U.S.C. § 1961(5), would hardly want the majority of such injuries to go unremedied because of the mechanical application of a statute of limitations accrual designed for violations of a different nature.

The more natural and workable model for accrual already exists in criminal RICO prosecutions. While *Malley-Duff* recognized that the length of RICO's criminal statute of limitations was not the product of anything unique to RICO,

483 U.S. at 155-56, 97 L. Ed.2d at 133, the accrual of such a limitation is and should be based on RICO's unique qualities, including the presence of "[m]ultiple injuries, spread over time." The "last predicate act" rule adopted by the Third Circuit Court of Appeals most accurately reflects RICO's unique concepts, and should be adopted by this Court.

CONCLUSION

For the reasons stated above, the judgment below should be reversed and remanded with directions that the question of accrual of Petitioners' RICO cause of action be addressed in light of the rule stated in *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988).

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1996

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA and JOANNE SIRAGUSA,
Petitioners,

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD. and BECKLEY, SINGLETON, DELANOY, JEMISON & LIST,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR AMERICAN HONDA MOTOR COMPANY, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF FOR AMERICAN HONDA MOTOR COMPANY, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

American Honda Motor Company, Inc. is the American distributor of Honda automobiles, motorcycles, all-terrain vehicles, and other motorized vehicles. As a major participant in the American economy, Honda, like so many other legitimate businesses, has found itself subject to lawsuits seeking treble damages under RICO. In particular, it is currently defending numerous lawsuits brought by Honda dealers arising out of the convictions of several of Honda's executives for defrauding *Honda* by misusing their positions to obtain bribes from dealers in exchange for, *inter alia,* preferential treatment with respect to the award of new Honda dealerships. As a result, issues relating to the statute of limitations for RICO, including the accrual question presented in this case, are of critical importance to Honda.

The plaintiffs in the cases against Honda have submitted an amicus brief arguing for the broadest possible accrual rule. Honda accordingly submits this brief to apprise the Court why such an approach is fundamentally misguided and why no accrual rule broader than the one adopted by the court below is either necessary or appropriate.[1] In this brief, we neither respond to the factual allegations of the plaintiff-dealers nor provide a point-by-point reply to their legal arguments. This, after all, is not a case between Honda and its dealers. Instead, we provide an overall framework for the consideration of the accrual issue and respond to the key criticisms levied by petitioners, their amici, and some of the lower courts against the Ninth Circuit's accrual rule and, by implication, the Clayton Act accrual rule, which we endorse as being the most consistent with both the Court's statute-of-limitations jurisprudence and its prior RICO decisions.

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[1] The parties have consented to the filing of this brief. Letters evidencing their consent have been lodged with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

Resolution of this case should be straightforward. The general rule is that a claim accrues and the statute of limitations begins to run when all elements of the claim are in existence. This is the rule for federal antitrust claims under the Clayton Act. Because this Court already has determined that the Clayton Act is the appropriate source from which to borrow the statute of limitations for RICO, it is eminently logical to borrow the Clayton Act's accrual rule as well.

Either the Clayton Act accrual rule or the Ninth Circuit's "injury discovery" rule, combined with traditional tolling principles, appropriately balances the important federal interest in cutting off stale claims against the equally valid interest in vindicating RICO's purposes. By contrast, the "injury and pattern discovery" rule endorsed by the petitioners and the "last predicate act" rule urged by their amici give inadequate weight to the concerns underlying statutes of limitation and would create an undesirable incentive for lawyers to use their existing cases as a means of digging up stale, but potentially lucrative, claims.

ARGUMENT

Petitioners' brief, the briefs of their two amici, and many of the lower court decisions on this issue suffer from the same shortcoming: they complicate and confuse the inquiry by starting in the middle instead of the beginning. We believe that, if the Court starts with first principles, it will find the answer to the accrual issue to be both simple and sensible. Accordingly, in Part I of this brief, we show how fundamental statute-of-limitations principles compel adoption of the Clayton Act accrual rule, which embodies no "discovery" requirement. We then turn in Part II to explaining why, if some "discovery" requirement is to be superimposed, that requirement should be limited to the existence of the injury and should not extend to the existence

of a "pattern of racketeering," as petitioners advocate, or to the existence of the "last predicate act" that is part of the pattern, as their amici urge.

I. BASIC STATUTE-OF-LIMITATIONS PRINCIPLES COMPEL ADOPTION OF THE CLAYTON ACT ACCRUAL RULE, UNDER WHICH "KNOWLEDGE" AND "DISCOVERY" ARE IRRELEVANT.

A. Statutes Of Limitations Serve Important Public Policies.

No discussion of accrual principles should begin without recognizing the salutary purposes served by statutes of limitations. As this Court emphasized a half century ago:

> "Statutes of limitation * * * are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

Order of Railroad Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944). Indeed, from the earliest days of the Republic to the present, this Court has held to the view that "[a] federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.'" *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985) (quoting *Adams* v. *Wood*, 2 Cranch 336, 342 (1805)). See also *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (noting that statutes of limitations "'are found and approved in all systems of enlightened jurisprudence,'" and should be regarded "as a 'meritorious defense, in itself serving a public interest'") (quoting *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), and *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938)).

B. The General Rule Is That The Limitations Period Begins To Run As Soon As All Elements Of A Claim Are In Existence, Without Regard To The Plaintiff's "Knowledge."

Many of the lower courts addressing the RICO accrual issue have debated about *which* elements of a RICO claim the would-be plaintiff must have "knowledge" of in order to trigger the statute of limitations. Although these decisions might lead an uninformed observer to conclude otherwise, it is well settled that, as a general rule, causes of action accrue and statutes of limitation begin to run when there is a "complete and present cause of action." *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941). See also *Moline Plow Co.* v. *Webb*, 141 U.S. 616, 623 (1891) (it is a "general rule that limitation begins to run from the time the plaintiff could sue"); *Clark* v. *Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875) ("[a]ll statutes of limitation begin to run when the right of action is complete"); 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 6.1, at 370 (1991) ("Frequently, legislation stating that commencement [of the limitations period] occurs when the plaintiff's cause of action accrues is interpreted by courts to mean that moment when the plaintiff has a complete and present cause of action."); 54 C.J.S. *Limitations of Actions* § 81, at 116 (1987) ("Unless a statute provides otherwise, the statute of limitations begins to run at the time when a complete cause or right of action accrues or arises, which occurs as soon as the right to institute and maintain a suit arises.").

In other words, the general rule is, and long has been, that it is the *existence* of the elements of the cause of action, not the plaintiff's *knowledge* of all or some of those elements, that triggers the statute of limitations:

> "Generally, mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations. Except where modified by statute, the rule is that the cause of action accrues when the act upon which the legal action is based took place and not when the damage became known. Difficulty in ascertaining the existence of a cause of action is irrelevant."

Id. § 87, at 123 (footnotes omitted). Accord 2 CALVIN W. CORMAN, *supra*, § 11.1.1, at 134 ("Generally, the cause of action accrues, and the statute of limitations begins to run, at the time of the occurrence of a judicially recognizable injury or event constituting a breach of duty. The statute commences at that time even though the plaintiff is unaware of the accrual of his or her cause of action.").

Against this backdrop, some courts have fashioned a "discovery" element as an exception to the general rule in selected types of cases. That "discovery" exception — which provides that the statute of limitations begins to run from the date the plaintiff discovered or reasonably should have discovered the injury (and, in some cases, the cause of the injury and/or the identity of the tortfeasor) — was developed in medical malpractice cases to address the problems of foreign objects left in patients' bodies during surgery and in occupational disease cases to address the problem of diseases with long latency periods. See 2 CALVIN W. CORMAN, *supra*, §§ 11.1.2.1, 11.1.2.3; 54 C.J.S. *Limitations of Actions* § 87, at 124. However, the "discovery rule" remains an *exception* to be invoked "circumspectly" as "an equitable adjustment in, not an abrogation of, statutes of limitations." *Ibid.*

Some cases have stated broadly that "[u]nder federal principles, a claim accrues when the plaintiff 'knows or has reason to know' of the injury that is the basis of the action." *Cullen* v. *Margiotta*, 811 F.2d 698, 725 (2d Cir. 1987) (quoting *Pauk* v. *Board of Trustees of City Univ.*, 654 F.2d 856, 859 (2d Cir. 1981)). These broad statements, however, trace back to cases applying the discovery rule in the narrow contexts of medical malpractice and occupational diseases. *E.g.*, *Young* v. *Clinchfield R.R.*, 288 F.2d 499, 503 (4th Cir.

1961) (*Urie* v. *Thompson*, 337 U.S. 163 (1949), "unquestionably demonstrates the Court's view that *when the nature of the injury is such that it does not manifest itself immediately*, the determination of when the cause of action accrued does not depend on when the injury was inflicted" but rather on "when the plaintiff has reason to know he has been injured") (emphasis added).

This Court has never held that the "discovery" exception should become the norm in all federal cases. Moreover, even if this were in fact the general federal rule, it manifestly is not the rule under the Clayton Act, which, as we argue below, provides the appropriate model here.

C. The Clayton Act Statute Of Limitations, Which This Court Has Borrowed For RICO, Is Subject To The General Accrual Rule, Without An Exception For "Discovery."

1. Significantly, the general accrual rule — *without* a "discovery rule" exception — applies to federal antitrust claims brought under the Clayton Act. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) ("Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business."). Thus, except when the plaintiff proves "fraudulent concealment" of the operative facts, the statute of limitations for treble-damages claims under the antitrust laws begins to run as soon as the anticompetitive conduct causes injury, irrespective of the plaintiff's "knowledge" of any of the elements of the accrued claim.[2]

---

[2] See, *e.g.*, *Information Exchange Sys., Inc.* v. *First Bank Nat'l Ass'n*, 994 F.2d 478, 484 (8th Cir. 1993) (subject to an exception for fraudulent concealment, "[a] cause of action accrues under the antitrust laws when the defendant commits an act that injures the plaintiff's business"); *Granite Falls Bank* v. *Henrikson*, 924 F.2d 150, 153 (8th Cir. 1991) ("accrual in antitrust actions depends on the commission of the defendant's injurious act rather than on the plaintiff's knowledge of that act or the resulting injury"); *Higgins* v. *New York Stock Exchange, Inc.*, 942 F.2d 829, 832 (2d Cir. 1991) ("A cause of action for violation of the antitrust laws ordinarily accrues as soon as there is injury to competition."); *Texas* v. *Allan Constr. Co.*, 851 F.2d 1526, 1528 (5th Cir. 1988) (in action alleging conspiracy in restraint of trade, limitations period "begins with an overt act done pursuant to the conspiracy" unless plaintiff can "demonstrate that fraudulent concealment tolled the running of the limitations period"); *Beneficial Standard Life Ins. Co.* v. *Madariaga*, 851 F.2d 271, 274-275 (9th Cir. 1988) (in actions governed by the Clayton Act statute of limitations, "the plaintiff's knowledge is generally irrelevant to accrual, which is determined according to the date on which injury occurs"); *Hennegan* v. *Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1302 (9th Cir. 1986) ("Ignorance of an antitrust cause of action alone is insufficient to toll the statute of limitations."); *Akron Presform Mold Co.* v. *McNeil Corp.*, 496 F.2d 230, 233 (6th Cir. 1974) (absent fraudulent concealment or other conduct by the defendant that induces the plaintiff not to file suit, Clayton Act's statute of limitations "commences to run from the commission of the last overt act causing injury or damage").

That settled doctrine under the federal antitrust laws ought to be dispositive here. This Court already has held that, "[t]ogether with the similarities in purpose and structure between RICO and the Clayton Act, the clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act strongly counsels in favor of application of the 4-year statute of limitations used for Clayton Act claims." *Agency Holding Corp.* v. *Malley-Duff Assocs., Inc.*, 483 U.S. 143, 152 (1987). Particularly because the Clayton Act's accrual rule pre-dated enactment of RICO, it makes no sense to adopt the Clayton Act's four-year statute of limitations, which runs from accrual of the claim, without also adopting the Clayton Act's accrual rule.

Indeed, in performing the analogous task of determining the appropriate statute of limitations for the implied right of action under SEC Rule 10b-5, this Court rejected the idea of borrowing one component of the 1934 Act's explicit one-year/three-year statute of limitations, while substituting for the other component a case-by-case laches defense. *Lampf,*

Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson,* 501 U.S. 350, 362 n.8 (1991). The Court commented that "such a practice comes close to the type of judicial policymaking that our borrowing doctrine was intended to avoid." *Ibid.*

As with the two-pronged statute of limitations borrowed in *Lampf,* the Clayton Act's accrual rule — which, after all, is simply the general accrual rule — is "indivisible" from the Clayton Act's statute of limitations. Here, as in *Lampf,* cobbling together the Clayton Act's statute of limitations with some alien accrual rule would constitute "the type of judicial policymaking that [this Court's] borrowing doctrine was intended to avoid."

2. The Clayton Act statute of limitations and its accompanying accrual rule have existed, and worked well, for decades. Had the combination of a four-year limitations period with the general accrual rule worked a substantial hardship on antitrust plaintiffs or undermined the deterrent effect of the civil antitrust remedy, Congress surely would have changed one or the other.

In fact, the Clayton Act limitations period and accrual rule are manifestly reasonable. To begin with, contrary to the assertions of petitioners and their amici, four years is not an unreasonably short time to "discover" the basis for bringing a lawsuit. Four years is the duration of an entire college education. It takes less than four years to build a skyscraper. Four years is the period that the Constitution fixes for the President to accomplish the objectives of that office. In four years, claimants will bring tens of thousands of civil suits in federal courts, including huge numbers of RICO claims. And, during a four-year period, this Court will decide 300 to 400 cases on the merits and fill 16 volumes of the U.S. Reports. Particularly given the unprecedented, and ever-increasing, availability of information, now is hardly the time to conclude that a four-year limitations period is so harsh as to necessitate abandonment of the general accrual rule in favor of some broad-based discovery rule.

Moreover, the Clayton Act's accrual rule, like the general accrual rule, is subject to tolling if the defendant engaged in some course of action designed to deceive a potential plaintiff into ignoring his accrued claim, even though he or she has already suffered actionable injury. See note 2, *supra*. These tolling principles ameliorate unfairness and help distinguish cases in which the potential defendant actively prevents an injured victim from discovering the violation from those in which the plaintiff simply has not been diligent in investigating the cause of his or her injury. These principles would perform the same function in RICO cases governed by the Clayton Act accrual rule.

Finally, it bears mention that, even if a plaintiff does not discover an on-going antitrust conspiracy within four years of the first injury, the plaintiff is not completely out of court. Rather, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act." *Zenith,* 401 U.S. at 338. "[A]s to those damages, the statute of limitations runs from the commission of the act." *Ibid.* Thus, while tardy plaintiffs might find that they are time barred from recovering some of their damages, such plaintiffs can still recover treble damages for later incurred injuries.

This corollary to the Clayton Act accrual rule would serve a similar ameliorative function in RICO cases. See, *e.g., McCool* v. *Strata Oil Co.,* 972 F.2d 1452, 1465 (7th Cir. 1992) ("[a]s in a civil antitrust case, a new cause of action under RICO arises on the occurrence of each separate injury"). Indeed, plaintiffs would continue to have causes of action under state and perhaps other federal law for the offenses (including fraud) that constitute the specific predicate acts. Those claims would be subject to their own statutes of limitations and accrual rules. Thus, the chances are even greater in the RICO context that even the dilatory plaintiff can pursue full compensation (or, if punitive damages are

available, more than full compensation), even if the plaintiff has not timely asserted a RICO claim.

In sum, the Court should hold that RICO claims, like federal antitrust claims, accrue as soon as all of the elements of the claim exist and that the plaintiff's "knowledge" is not a necessary ingredient in the accrual of the claim. Once all of the elements of a RICO claim exist — including injury and a "pattern of racketeering" — the four-year statute of limitations begins to run.

II. IF SOME "DISCOVERY" REQUIREMENT IS TO BE SUPERIMPOSED IN RICO CASES, IT SHOULD APPLY ONLY TO THE EXISTENCE OF THE INJURY.

Assuming that, contrary to the foregoing arguments, the Court concludes that some discovery rule is warranted in this context, we submit that the "injury discovery" rule adopted by the court below is the appropriate one. That rule, which appears to be the majority rule in the courts of appeals (see Pet. App. 7a-8a), appropriately balances the salutary purposes of statutes of limitations with whatever concern there may be about the statute running before the plaintiff realizes that he or she has been injured. (As in antitrust cases, and unlike in some medical malpractice and occupational disease cases, it is highly unlikely that a person injured as a result of a RICO pattern will not notice the injury soon after it occurs.)

A. The Criticisms Of The "Injury Discovery" Rule And, By Implication, The Clayton Act Accrual Rule, Are Misguided.

Petitioners, their amici, and some of the courts of appeals level four principal criticisms against the Ninth Circuit's "injury discovery" rule and, by implication, the Clayton Act accrual rule. First, they state that the "injury discovery" rule could result in the statute of limitations running before a cause of action exists. See Pet. Br. 13, 41-44; Exec. Comm. Am. Br. 5; NASCAT Am. Br. 5-8 & n.8; *Keystone Ins. Co.*

v. *Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988). Second, they argue that neither of those rules is appropriate for RICO causes of action predicated upon allegations of fraud. Pet. Br. 29-32. Third, they contend that the "injury discovery" rule and, by implication, the Clayton Act accrual rule cannot be squared with the accrual rule adopted in *United States* v. *Kubrick*, 444 U.S. 111 (1979). Pet. Br. 34-36. And fourth, they contend broadly that these accrual rules do not comport with Congress's mandate that RICO be given a "liberal construction" to effectuate its remedial purposes. Pet. Br. 33; Exec. Comm. Am. Br. 9, 12; NASCAT Am. Br. 22 n.25. These arguments all miss the mark.

1. The contention that the "injury discovery" rule could result in the statute of limitations running before a RICO cause of action exists is the prototypical strawman. It derives from a fundamental misunderstanding of that rule. (Needless to say, no one ever has leveled this criticism against the Clayton Act accrual rule, which, by definition, requires all elements of an antitrust cause of action to be extant before the statute of limitations is triggered.) Under the "injury discovery" rule, the statute of limitations does not begin to run until *both* (1) all elements of the cause of action are present *and* (2) the plaintiff knows or reasonably should know that he or she has been injured. As the court below explained it:

> "Because a RICO cause of action cannot accrue until all the elements exist, no statute of limitations can begin to tick until a pattern exists, which will not be until continuity exists and the one year usually required to establish continuity has already lapsed. Both accrual rules at issue here [*i.e.*, the "injury discovery" rule and the "injury and pattern discovery" rule] require all the elements to exist; neither will begin to tick until the one-year continuity delay has lapsed. Because this one-year delay impacts both rules equally, it favors neither."

Pet. App. 12a (citation omitted). Accord *McCool*, 972 F.2d at 1465 ("There must, of course, be a pattern of racketeering before the plaintiff's RICO claim accrues, and this requirement might delay accrual until after the plaintiff discovers her injury," if the plaintiff is injured by a predicate act before a "pattern of racketeering" has evolved.).

2. The suggestion that the accrual rule for fraud actions — *i.e.*, that the statute of limitations is triggered when the plaintiff discovers or should have discovered the fraud — should apply to RICO actions is equally misguided. Although some kinds of fraud are listed among the multiple criminal violations that might qualify as predicate acts, RICO most assuredly is not a federal fraud statute. It is the special confluence of otherwise criminal acts that involve an "enterprise" and form a "pattern" that converts a state common law action into a federal treble damages claim. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 497 (1985). It thus is quite beside the point that alleged fraud has been a frequent basis for bringing a RICO claim.[3] The bottom line is that this Court has concluded that the most appropriate analogy for RICO's civil remedy is to antitrust, not common law fraud. *Agency Holding*, 483 U.S. at 149, 151-152. See also *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 267 (1992) ("[w]e have repeatedly observed that Congress modeled § 1964(c) [of RICO] on the civil action provision of the federal antitrust laws, § 4 of the Clayton Act"); *Sedima*, 473 U.S. at 489 ("[t]he clearest current in [RICO's legislative] history is the reliance on the Clayton Act model").

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[3] We note that fraud should become a less frequent basis for civil RICO suits (both absolutely and proportionately) now that Congress has eliminated securities fraud as a predicate act (see 18 U.S.C. § 1964(c) (as amended by P.L. 104-67, § 107 (1995)), while adding video and software piracy, criminal copyright infringement, and trafficking in counterfeit goods (see 18 U.S.C. § 1961 (as amended by P.L. 104-153, § 3 (1996)).

Thus, applying the special fraud accrual rule to the ample four-year antitrust statute of limitation for all RICO claims would be both illogical (because not all RICO claims are based on fraud) and unfair.[4] It also is unnecessary. Even if the Clayton Act accrual rule might result in a *RICO* suit being time barred, state accrual principles would apply to any direct claims based on the predicate acts that constitute fraud. For example, if the RICO claim is based on mail fraud, the plaintiff would remain entitled to bring a common law fraud claim (no doubt seeking punitive damages far in excess of twice the compensatories) subject to whatever state accrual rules apply to such a claim. Thus, no great injustice and no underdeterrence of fraud will result from applying either the Clayton Act accrual rule or the "injury discovery" rule to RICO claims, even those involving "fraud" predicates.

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[4] Indeed, a majority of the States have adopted statutes of limitations for fraud that are less than four years. See Ala. Code § 6-2-38(l) (two years); Alaska Stat. § .09-10.070 (two years); Ariz. Rev. Stat. Ann. § 12-543 (three years); Ark. Code Ann. § 16-56-105 (three years); Cal. Civ. Proc. Code § 338 (three years); Colo. Rev. Stat. Ann. § 13-80-101(1)(c) (three years); Conn. Gen. Stat. Ann. § 52-577 (three years); Del. Code Ann. tit. 10, § 8106 (three years); D.C. Code Ann. § 12-301(8) (three years); Idaho Code § 5-218(4) (three years); Kan. Stat. Ann. § 60-513 (two years); La. Civ. Code Ann. art. 3492 (one year); Md. Code Ann. Cts. & Jud. Proc. § 5-101 (three years); Mass. Gen. Laws Ann. ch. 260, § 2A (three years); Miss. Code Ann. § 15-1-49 (three years); Mont. Code Ann. § 27-2-203 (two years); Nev. Rev. Stat. § 11.190 (three years); N.H. Rev. Stat. Ann. § 508:4 (three years); N.C. Gen. Stat. § 1-52 (three years); Okla. Stat. Ann. tit. 12, § 95 (two years); Or. Rev. Stat. § 12.110 (two years); 42 Pa. Cons. Stat. Ann. § 5524 (two years); S.C. Code Ann. § 15-3-530(5) (three years); Tenn. Code Ann. § 28-3-105 (three years); Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (two years); Utah Code Ann. § 78-12-26 (three years); Va. Code Ann. § 8.01-248 (two years); Wash. Rev. Code Ann. § 4.16.080 (three years); W. Va. Code § 55-2-12 (two years). Moreover, the statute of limitations for securities fraud is the shorter of three years from the fraud and one year from the discovery of the fraud (*Lampf*, 501 U.S. at 364) — far shorter than the four years from discovery approach urged by petitioners and their amici.

3. Petitioners' reliance upon *Kubrick* is unwarranted because the Court in that case did not adopt any kind of discovery requirement, even for a limited class of federal claims. *Kubrick* involved a medical malpractice claim under the Federal Tort Claims Act ("FTCA"). The Court was confronted with the question whether the FTCA's two-year statute of limitations barred the claim of a plaintiff who discovered his injury and the cause of that injury more than two years before he filed suit or whether instead the suit was timely because it was filed less than two years after the plaintiff learned that the injury was the result of medical malpractice. The Court did not affirmatively decide whether to adopt the "injury and cause" discovery rule for medical malpractice cases and/or FTCA cases generally (because the plaintiff would have been untimely whether or not that was the rule).[5] Nevertheless, it roundly rejected the plaintiff's contention that the two-year statute of limitations under the Federal Tort Claims Act should not begin to run until after discovery that the medical treatment that caused the injury constituted malpractice.

Even if *Kubrick* could be understood to have left room to create an "injury and cause discovery" rule in medical malpractice cases under the FTCA, it would hardly support petitioners' proposed "injury and *pattern* discovery" rule. Quite simply, the cause of injury under RICO is the predicate acts, not the pattern. *Sedima*, 473 U.S. at 497 ("Any recoverable damages occurring by reason of a violation of §

---

[5] See 444 U.S. at 120 ("[T]he Court of Appeals recognized that the general rule under the Act has been that a tort claim accrues at the time of the plaintiff's injury, although it thought that *in medical malpractice cases* the rule had come to be that the 2-year period did not begin to run until the plaintiff has discovered both his injury and its cause. But even so — and the United States was prepared to concede as much *for present purposes* — the latter rule would not save Kubrick's action since he was aware of these essential facts [more than two years before he filed suit].") (emphasis added).

1962(c) [of RICO] will flow from the commission of the predicate acts."). Just as the Court refused to allow FTCA suits to be delayed until discovery that the injury resulted from a breach of the duty of care, there is no basis here for allowing delay of RICO suits until discovery that the act causing the plaintiff's injury was part of a pattern that may have injured unrelated persons as well.

4. Finally, the by-now tired refrain that RICO is to be "liberally construed" is not an open invitation to accept whatever argument a RICO plaintiff is currently proffering. Indeed, that bromide did not prevent the Court from interpreting RICO to embody a rigorous proximate cause requirement. See *Holmes*, 503 U.S. at 265-274. It did not prevent the Court from holding that the defendant must have participated in the management or operation of the enterprise to be subject to RICO liability. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 183-184 (1993). And it did not prevent the Court from rejecting broad interpretations of the "pattern" requirement. See *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 236, 243 n.4 (1989) (rejecting notions that "a pattern is established merely by proving two predicate acts" and that RICO applies to short periods of criminal activity that are unlikely to recur in the future).

The Court already has concluded that borrowing the Clayton Act's statute of limitations does not violate the "liberal construction" mandate. See *Agency Holding*, 483 U.S. at 155-156 (rejecting use of the longer statute of limitations for criminal RICO violations). There is no reason whatever to conclude that use of its accompanying accrual rule is any more violative of that mandate.

B. Neither The "Injury And Pattern Discovery" Approach Nor The "Last Predicate Act" Approach Gives Adequate Weight To The Strong Federal Interest In Barring Stale Claims.

Unlike the Clayton Act and "injury discovery" rules, the "injury and pattern discovery" rule endorsed by petitioners does not fairly balance the competing interests. That kind of rule threatens to postpone indefinitely the running of the statute of limitations because the concept of a "pattern" is a nebulous one, knowledge of which courts are sure to be hesitant about imputing. Indeed, precisely because of the vagaries involved in determining whether or not a pattern exists, an "injury and pattern discovery" rule will undermine "the federal interest * * * in having 'firmly defined, easily applied rules'" governing statutes of limitations. *Wilson*, 471 U.S. at 270 (quoting *Chardon* v. *Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting).

The "last predicate act" rule adopted by the Third Circuit and endorsed by both of petitioners' amici, is even more unbalanced than the "injury and pattern discovery" rule. This proposed rule lacks support in any other branch of civil jurisprudence. Nowhere else does a potential defendant's commission of a wrongful act directed at a third person revive the long-lapsed claim of an unrelated plaintiff.

The "last predicate act" approach is nothing but an invitation to gamesmanship. It would allow plaintiffs to wait until four years after the last act that is part of the supposed "pattern" even if their injuries ceased ten or twenty years earlier. And it also would enable lawyers who represent one client injured by a RICO predicate act to reach back to the very beginning of the alleged "pattern" in search of clients to bring new suits for old injuries. Nothing could be more inimical to the important federal principle of cutting off stale claims. See *Rodriguez* v. *Banco Central*, 917 F.2d 664, 666-667 (1st Cir. 1990) (Breyer, J.)

CONCLUSION

If the Court reaches the second issue presented by petitioners, it should adopt the Clayton Act accrual rule or, at most, the "injury discovery" rule.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TOM GRIMMETT, *ET AL.*,

Petitioners,

—v.—

PATRICIA L. BROWN, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL HOCKEY LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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No. 95-1723

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

TOM GRIMMETT, *ET AL.*,

PETITIONERS,

VS.

PATRICIA L. BROWN, *ET AL.*,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL HOCKEY LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This brief in support of respondents is submitted in accordance with Rule 37 of the Rules of this Court. The National Hockey League ("NHL") has obtained and filed herewith the written consent of the petitioners and respondents to the submission of this brief.

INTEREST OF AMICUS CURIAE

The NHL and 22 of its member clubs are defendants in a civil RICO action captioned *Forbes v. Eagleson*, Civil Action No. 95-7021, pending in the United States District Court for the Eastern District of Pennsylvania. The named plaintiffs in that action, David S. Forbes, *et al.*, along with another group of RICO plaintiffs,[1] have submitted an *amicus curiae* brief in support of petitioners.[2]

The NHL joins in the arguments made by respondents and the other *amici* urging affirmance, and submits this brief chiefly to present the Court with a concrete example of the abuses inherent in any expansive RICO statute of limitations accrual rule, particularly the Third Circuit's "last predicate act" approach advocated by petitioners' *amici*. What this aberrant rule has done is to allow a group of plaintiffs who – for six, if not eleven, years prior to filing their RICO complaint – knew all the material facts underlying their claim of injury, and all the material facts relating to their allegations of a pattern of racketeering activity, to survive a motion to dismiss on statute of limitations grounds.

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1 Plaintiffs' Executive Committee in *In re American Honda Motor Co., Inc. Dealerships Relations Litigation*, MDL No. 1069 (D. Md.).

2 That *amicus* brief was accepted by this Court on September 20, 1996.

ARGUMENT

Introduction

While it has been conclusively established by this Court that the statute of limitations for civil RICO claims is four years, *see Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987), the Circuits have divided as to when a civil RICO claim accrues and the statute begins to run. The Third Circuit, one of the first to address the accrual issue in the wake of *Agency Holding*, determined that a civil RICO claim accrues on:

> the date the plaintiff knew or should have known that the elements of a civil RICO cause of action existed, unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern. In that case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same "pattern."

Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1126 (3d Cir. 1988).

None of the other Circuits have followed the *Keystone* accrual rule. The Third Circuit stands alone in allowing the statute of limitations to be extended simply because of the alleged commission of further predicate

acts in the same pattern, even if those predicate acts have not caused any injury whatsoever to the plaintiff.

Rejection of the "Last Predicate Act" Rule

The Ninth Circuit in the decision below, together with the First, Second, Fourth, Fifth, Seventh and District of Columbia Circuits, have embraced what has become known as the "injury discovery" rule, under which a civil RICO claim accrues when the plaintiff discovered or should have discovered the injury; any subsequent injury gives rise to a *new* claim, but does not extend the limitations period for the earlier injury. *See Rodriguez v. Banco Central*, 917 F.2d 664, 665-68 (1st Cir. 1990) (Breyer, C.J.); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-66 (7th Cir. 1992); *Grimmett v. Brown*, 75 F.3d 506 (9th Cir.), *cert. granted*, 116 S. Ct. 2521 (1996); *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988); *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-90 (D.C. Cir. 1989); *see also Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987) (same, but without separate accrual rule for each injury).

The Sixth, Eighth, Tenth and Eleventh Circuits have adopted an alternative accrual rule, known as the "injury and pattern discovery" rule, pursuant to which a civil RICO claim accrues when the plaintiff discovers, or reasonably should have discovered, the existence and source of the injury and that the injury is part of a pattern. *See Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233 (6th Cir. 1992); *Granite Falls Bank v. Henrickson*, 924 F.2d 150, 153-54 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines*

& Jonas, 913 F.2d 817, 820 (10th Cir. 1990), *overruled in part on other grounds sub nom. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Fla. Inc.*, 906 F.2d 1546, 1550-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991).

Judicial Criticism of Keystone

The Third Circuit's rule has been expressly criticized by a number of circuits. In the First Circuit's decision in *Rodriguez v. Banco Central*, 917 F.2d at 667, then-Chief Judge Breyer rejected the *Keystone* approach because of the extended period of time that it provides for plaintiffs to file suit:

> [i]f the "pattern" took the form of one related act, say, every two years (so that each act "occurred within ten years . . . after a prior act"), say for thirty or forty years, the Third Circuit's test, literally interpreted, would permit the plaintiff (injured in 1980) to bring suit thirty-four or forty-four years later.

Likewise, the Seventh Circuit has criticized the *Keystone* rule's potential effect of permitting a further act to sweep otherwise time-barred prior acts into the limitations period even when the further act did not injure the plaintiffs:

> while more recent acts in a normal continuing violation will involve harm to the plaintiff, *a RICO plaintiff [under the Keystone rule] could bring suit based on recent predicate acts that harmed others, or no one.*

McCool v. Strata Oil Co., 972 F.2d at 1466 (emphasis supplied).

The pernicious effects of the *Keystone* rule, and then-Chief Judge Breyer's prediction in *Rodriguez* that *Keystone* "would permit the plaintiff . . . to bring suit thirty-four . . . years later," can perhaps best be illustrated by an all-too-real example: how one set of plaintiffs were able to sit on their rights for several years – with full knowledge of all the facts underlying their RICO claims – and survive a motion to dismiss on statute of limitations grounds solely because they chose to bring suit in the Third Circuit.

Forbes v. Eagleson

For many years, professional hockey players, their agents and members of the news media charged that R. Alan Eagleson abused his position as Executive Director of the National Hockey League Players Association (the "NHLPA"). These detractors complained that Mr. Eagleson was excessively friendly with management, had numerous conflicts of interest and seemed to be far more interested in various schemes to enrich himself personally than he was in representing his constituency.

As early as July 2, 1984, a *Sports Illustrated* article entitled "The Man Who Rules Hockey" described in great detail Mr. Eagleson's asserted "conflicting roles" and the benefits he purportedly obtained for himself as a "friend of management." The article accused Mr. Eagleson of diverting funds from international hockey tournaments and improperly profiting from his control over the placement of player disability insurance coverage. It listed the various individuals and companies through whom Mr. Eagleson allegedly channeled his international

hockey ventures (including many of the defendants named in the *Forbes* complaint), and repeatedly suggested that Mr. Eagleson was profiting from each of these various enterprises.

The widespread belief among NHL players that Mr. Eagleson had for many years engaged in extensive misconduct to the detriment of the union caused the players to commission attorney Edward Garvey to conduct a thorough evaluation of Mr. Eagleson's activities. In the summer of 1989, more than 6-1/2 years prior to the initiation of the *Forbes* action, Mr. Garvey issued a lengthy and detailed report that echoed and expanded upon the allegations of the *Sports Illustrated* article and set forth at length and with considerable specificity *all* the essential elements of the *Forbes* complaint.

The essence of the Garvey Report was that Mr. Eagleson was controlled by the NHL, which in turn obtained everything it wanted in its labor negotiations with the union. Mr. Garvey advised the players that Mr. Eagleson's loyalty had in effect been purchased by the NHL in exchange for the revenues from international hockey tournaments that Mr. Eagleson managed. The Garvey Report revisited each major event in the union's history, alleging at every step along the way that the NHL, with Mr. Eagleson's connivance, had artificially depressed player compensation and benefits. Mr. Garvey concluded that the NHL "won" every negotiation with the union because of its alleged "deal" with Mr. Eagleson.

Over six years later, a group of lawyers – including Mr. Garvey – recast these criticisms of Mr. Eagleson into a RICO action captioned *Forbes v. Eagleson*, Civil Action No. 95-7021 (E.D. Pa.). The *Forbes* plaintiffs boasted that they chose to bring their case in Pennsylva-

nia, a forum that bears virtually no relationship to the facts of the dispute, to take advantage of the *Keystone* rule and withstand a statute of limitations defense.

Echoing the statements in the *Sports Illustrated* article and the Garvey Report, the *Forbes* plaintiffs contend that, with respect to the four collective bargaining agreements negotiated between 1972 and 1991, when Mr. Eagleson's contract as Executive Director expired, a different and more beneficial agreement would have been reached had Mr. Eagleson not been given control of international hockey tournaments and disability insurance. According to the *Forbes* complaint, had Mr. Eagleson been a more vigorous bargainer, hockey players would have secured higher salaries and other benefits from their respective employer clubs.

Citing *Keystone* and noting that it was "bound by this Circuit's *unique* accrual rule" (2a; emphasis supplied), the district court denied the NHL's motion to dismiss the complaint. Although the allegations of the Garvey Report reverberate in the *Forbes* complaint, and the *Forbes* plaintiffs knew of their injury more than six years before the complaint was filed, the complaint was sustained under the "last predicate act" rule, with the predicate acts in question having nothing whatsoever to do with any of plaintiffs' purported injuries.

Forbes also illustrates the dangers of allowing the "last predicate" act to determine the point at which a civil RICO claim accrues; application of the *Keystone* principle demonstrates that in certain circumstances, the statute of limitations may not begin to run for years after the core racketeering activity has ceased and the enterprise has disbanded.

The *Forbes* plaintiffs attempted to enliven their claim by alleging that predicate acts occurred within four years of the filing of their complaint. Even though the alleged giving of "control" to Mr. Eagleson over international hockey was alleged to have occurred years earlier, the *Forbes* plaintiffs contended that whenever Mr. Eagleson received proceeds from the international tournaments the NHL committed a new and distinct predicate act. The district court accepted this proposition, on constraint of *Keystone*, concluding "that the transfers of tournament revenues to Eagleson throughout 1991 constitute further acts" extending the statute of limitations. (5a)[3]

Conclusion

On any level, allowing plaintiffs to bring suit many years after they became aware of all of the facts underlying their claims is antithetical to the concept and purpose of statute of limitations. As this Court stated in *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted), "[s]tatutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in

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3 In so doing, the district court declined to follow a line of cases holding that mere use of a previously conferred benefit (or, alternatively, the continued profiting from a wrongful act) is insufficient to create a string of new and separate predicate acts. *See Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 883 F.2d 48, 50 (7th Cir. 1989); *R.E. Davis Chem. Corp. v. Nalco Chem. Co.*, 757 F. Supp. 1499, 1520 (N.D. Ill. 1990); *see also Dynabest, Inc. v. Yao*, 760 F. Supp. 704, 708 (N.D. Ill. 1991).

time comes to prevail over the right to prosecute them.'" The "last predicate act" rule, which only the Third Circuit and petitioners' *amici* appear to endorse, allows stale claims to moulder and still fall within the statute of limitations.

We respectfully submit that public policy favors a rule that provides a measure of certainty to those who would sue or be sued in a civil RICO action, not one that allows claims to linger in perpetuity for so long as the effects of an abandoned racketeering enterprise continue to be felt.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Hockey League respectfully submits that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: October 15, 1996

APPENDIX

APPENDIX

DAVID S. FORBES ET AL.
v.
R. ALAN EAGLESON ET AL.
CIVIL ACTION NO. 95-7021.
UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF PENNSYLVANIA.
JULY 22, 1996,
AMENDED JULY 23, 1996.
MEMORANDUM AND ORDER

O'NEILL, J.

Defendants have moved to dismiss the Complaint or to transfer or stay the action. I will decide these motions on the pleadings[1] and thus must accept the well-pleaded factual allegations as true, construe them favorably to plaintiffs, and determine whether "under any reasonable reading of the pleadings, the plaintiff[s] may be entitled to relief." *Colburn v. Upper Darby Township*, 838 F.2d 663, 664-65 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989). Dismissal is proper at this stage only if no relief could be granted under any set of facts that could be proven. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

I. Statute of Limitations

Defendants assert that the Complaint, which was filed November 7, 1995, is time-barred under the

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[1] Because materials submitted outside the pleadings raise disputed issues of fact and admissibility I confine my inquiry to the pleadings and reserve consideration of the additional matter until further factual development.

four-year limitations period that governs civil RICO actions. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). A claim accrues when:

> plaintiff knew or should have known that the elements of a civil RICO cause of action existed, unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern. In that case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same racketeering activity.

Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1126 (3d Cir. 1988) (emphasis added); *accord Arab African Int'l Bank v. Epstein*, 10 F.3d 168, 174 (3d Cir. 1993).[2]

Plaintiffs allege an ongoing scheme between their former labor representative Alan Eagleson and the National Hockey League[3] whereby Eagleson, as director of the NHL Players' Association, "cooperated with the NHL ... to maintain a company dominated union to the detriment of the players and to the benefit of the NHL." Complaint at ¶ 58(l).

The NHL allegedly induced Eagleson's cooperation by: (1) entering international hockey tournament joint ventures with Eagleson and the NHLPA; (2) assuring the

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[2] I am bound by this Circuit's unique accrual rule.

[3] References to the NHL include all NHL-affiliated defendants.

tournaments' profitability by allowing players otherwise forbidden to compete outside the NHL to participate; and (3) affording Eagleson "substantial personal profit" by giving him "unsupervised control" of the tournaments and "deliberately and repeatedly fail[ing] to hold him accountable for [tournament] proceeds" belonging to the NHL and NHLPA. ¶¶ 2-3, 36-38. In return for diverting its share of tournament profits to Eagleson the NHL obtained "control and influence" over him which allowed it to elicit concessions in collective bargaining, player salaries and other players' rights, generating "substantial ... additional profits" for the NHL due to the "players' artificially low earnings." ¶¶ 3-4, 57.

Plaintiffs allege that this scheme of knowing or deliberate failures to hold Eagleson accountable for tournament revenues continued until Eagleson relinquished his role as NHLPA Executive Director on December 31, 1991 because Eagleson continued to receive and appropriate NHL and NHLPA tournament profits throughout that time. ¶¶ 3, 41, 43-46, 56. I must decide whether these wrongful receipts of NHL and NHLPA funds in late 1991 can constitute predicate acts within the alleged pattern of racketeering activity.

A. Predicate Acts

The Labor Management Relations Act forbids employers to deliver "any money or other thing of value" to labor representatives and forbids labor representatives to receive the same. 29 U.S.C. § 186(a)-(b). Violations of § 186 constitute predicate acts of racketeering under RICO. 18 U.S.C. § 1961(1)(C). Plaintiffs assert that: (1) "[e]ach receipt of [tournament] funds by Eagleson was a separate bribe under Section 186, and a separate predicate act;" and (2) these transfers of NHL funds to Eagleson

through international hockey ventures continued throughout 1991. Mem. at 16; Complaint at ¶¶ 41, 44-46, 56, 81.

It is well established that each delivery or receipt of a "thing of value" can constitute a separate § 186 violation and a separate RICO predicate act, even when the payment is part of one continuous, previously devised bribery scheme. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir. 1994), *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 900 (1995); *United States v. Boffa*, 688 F.2d 919, 934 (3d Cir. 1982).

Defendants, however, characterize Eagleson's ongoing receipt of tournament profits throughout 1991 as "mere use of a previously conferred benefit" or "continued profiting from a wrongful act," Reply Mem. at 7. Such further use of or profit from a previously obtained item would not constitute a further predicate act. *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 883 F.2d 48, 51 (7th Cir. 1989) (later sale of misappropriated software); *Dynabest, Inc. v. Yao*, 760 F. Supp. 704, 709 n.3 (N.D. Ill. 1991) (later use of wrongfully obtained customer list); *R.E. Davis Chem. Corp. v. Nalco Chem. Co.*, 757 F. Supp. 1499, 1520 (N.D. Ill. 1990) (later use of wrongfully obtained chemical formula).

The instant Complaint does not, however, allege that Eagleson received one thing of value--control over international hockey--and then merely used it in otherwise lawful ways. The predicate acts it alleges are thus not analogous to lawful transactions like the sale of software in Management Computer that are tainted only by the use therein of previously misappropriated items. Rather, the further transfers of value alleged in this case,

which themselves violate § 186, are more closely analogous to the later use of misappropriated software to make further unlawful acquisitions. Where, as here, the later acquisitions in themselves violate the law regardless of the assets used to facilitate them, Management Computer is distinguishable. I thus find Management Computer and its progeny inapposite and conclude that the transfers of tournament revenues to Eagleson throughout 1991 constitute further acts and not mere continuing uses of or profits from a prior wrong. Defendants further argue that in contrast to Cox and Boffa, which involved "affirmative acts by an employer," the continuing transfers of value alleged in this case constitute a mere "failure to ... prevent ... payment by a third party." Reply Mem. at 7. I am unpersuaded by their argument that a transfer of value violates § 186 only if the employer affirmatively and directly delivers the item of value to the labor representative.[4]

Section 186 forbids "all forms of bribery between management and labor officials" including indirect as well as direct means. *United States v. Lanni*, 466 F.2d 1102 (3d Cir. 1972). It does not permit such bribery as long as the schemes are structured so as to eliminate the need for management to affirmatively facilitate each transfer. Under such an interpretation employers could devise indirect or passive bribery schemes by simply affording labor representatives access to accounts and ignoring

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[4] Nor can I read the Complaint to suggest that a "third party" delivered the bribes when it alleges that: (1) Eagleson alone controlled tournament profits; and (2) tournament profits belonging to the NHL were transferred to Eagleson with the NHL's knowledge or deliberate ignorance. ¶¶ 2-3.

their periodic withdrawals therefrom. I do not read § 186 so narrowly.

I thus conclude that the Complaint, which asserts that the NHL transferred funds to Eagleson through December 31, 1991 by knowingly or deliberately allowing him to appropriate a share of their joint venture profits, adequately alleges predicate acts occurring after November 7, 1991.

B. Pattern

A further predicate act does not postpone accrual of a RICO claim unless it is within the same pattern of racketeering activity. *Keystone*, 863 F.2d at 1126. A pattern arises from common purposes, results, participants, methods, and other traits. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989).

Plaintiffs allege that "through at least the end of 1991" the "object and purpose" of the racketeering scheme was to:

> cause Eagleson ... to come under the influence and control of the NHL ... and to fail to aggressively represent the interests of the NHLPA players by granting unreasonable concessions to and failing to seek benefits from the NHL ... [and] to enable the Member Clubs to pay far less in compensation to the NHLPA players than they would otherwise have paid.

¶ 71. They thus allege common purposes underlying the scheme through the end of 1991.

Defendants argue that bribes to Eagleson in 1991 could not have shared these asserted purposes because Eagleson had not negotiated a collective bargaining agreement since 1988; thus any later bribes must have been "for some purpose other than to extract concessions ... in labor negotiations." Reply Mem. at 10.

I am not persuaded. First, payments may share a common purpose of management-labor bribery even if not intended to elicit future concessions; payments for past concessions can also form part of the same pattern. *Cox*, 17 F.3d at 1386. Second, the alleged object and purpose speaks not just in terms of bargaining concessions but also in terms of a more general failure to "aggressively represent" or "seek benefits for" the players. Reading these allegations favorably to plaintiffs, as I must when evaluating the sufficiency of the pleadings, I find that the alleged purpose extends beyond contract negotiations to all Eagleson's functions as a labor representative. His duty and opportunity to advance the players' interests, see ¶ 32, and thus the NHL's incentive to influence him, continued until he resigned as NHLPA Executive Director on December 31, 1991, regardless of when the last contract was entered or when it expired.[5] Because plaintiffs could prove facts consistent with their allegation that these payments shared a common purpose with the other alleged racketeering acts and formed part of the

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[5] Indeed the incentive to influence a labor representative may be strongest when a collective bargaining agreement is up for renegotiation as may have been the case in late 1991.

same pattern, dismissal on the pleadings would be inappropriate. *See Hishon*, 467 U.S. at 73.[6]

Finding that plaintiffs have adequately alleged predicate acts that: (1) constitute part of the same pattern of racketeering activity; and (2) fall within the limitations period which extends back to November 7, 1991, I will deny defendants' motion to dismiss the Complaint as time-barred.[7]

II. Standing and Proximate Causation

To establish standing to bring RICO a claim under 18 U.S.C. § 1964(c) plaintiffs must allege that defendants' violations proximately caused plaintiffs' injury. *Holmes v.*

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[6] The complaint sufficiently alleges predicate acts of violating 29 U.S.C. § 501 occurring after November 7, 1991 and constituting part of the same pattern of embezzlement and conversion to bring Count II within the limitations period. *See, e.g.*, ¶¶ 44-46, 81, 88, 96.

[7] Because *Keystone* delays accrual until notice of the last predicate act within the racketeering pattern and because I have found that the Complaint alleges such acts within the limitations period, I need not decide the date of other events that could trigger accrual. *See* 863 F.2d at 1126. I note, however, that because plaintiffs allege that both corruption of their labor representative and consequent losses of economic benefits occurred throughout 1991, see ¶¶ 4, 59, it would be difficult to conclude as defendants urge that any economic injuries suffered in 1991 were mere continuing effects of the 1988 collective bargaining agreement and could not under any set of facts constitute "new and distinct" injuries sufficient to delay accrual. *See Glessner v. Kenny*, 952 F.2d 702, 708 (3d Cir. 1991).

Securities Investor Protection Corp., 503 U.S. 258, 268-69 (1992) (requiring "some direct relation" between violations and injuries).

I am unpersuaded by defendants' argument that plaintiffs' alleged injuries are derivative of the NHLPA's and thus could not have been proximately caused by the alleged violations. Count I alleges that, because of payments made in violation of § 186, Eagleson harmed the players' interests by making concessions and failing to seek benefits, causing "substantial suppression" in the players' earnings. *See* ¶¶ 1, 4, 57-59. Because the NHLPA had no rights to player salaries or benefits I conclude that the injuries alleged under Count I are not derivative of any harm inflicted on the NHLPA but rather were a consequence of the alleged racketeering scheme.

Count II alleges that Eagleson and others misappropriated NHLPA funds. Though this conduct clearly caused economic harm to the NHLPA, the NHLPA has assigned its claims to plaintiffs. This assignment eliminates any risk of double liability and permits plaintiffs to bring this claim. *Cf. Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 n.7 (1977) (noting double liability concern but declining to address standing issue).

Defendants, citing *United States for Use and Benefit of Wulff v. CMA, Inc.*, 890 F.2d 1070 (9th Cir. 1989), argue that the assignment cannot relate back to revive a claim filed by a party other than the real party in interest. However, Fed. R. Civ. P. 17(a) provides that:

> No action shall be dismissed on the ground that it is not prosecuted by the real party in interest until a reasonable time has been allowed ... for ratification of commencement

> of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The Rule is intended "to prevent forfeiture of an action when determination of the right party to sue is difficult or when an understandable mistake has been made." *Wulff*, 890 F.2d at 1074 (citing Fed. R. Civ. P. 17 advisory committee note; 6 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1555). In this case the players' and the union's interests are closely intertwined. The Count II allegations, which affect not just general union funds but also items like the players' pension fund and disability insurance, blur distinctions between the union's and the players' interests. In light of this difficulty in discerning the identity of the real party in interest, a difficulty which distinguishes this case from Wulff, I conclude that the purposes underlying Fed. R. Civ. P. 17 would be served by recognizing the assignment.[8] I thus

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[8] Though I need not reach the issue I note that plaintiffs might have had standing even without the assignment. In *Bass v. Campagnone*, 838 F.2d 10 (1st Cir. 1988), the court denied union members standing to assert a RICO claim since the alleged injuries affected the union rather than its individual members. *Bass* is distinguishable, however, because in *Bass* more than half the union members opposed the suit, demonstrating a divergence between the interests of the union as a whole and those of the plaintiffs. Indeed, the *Bass* court noted that had the plaintiffs demonstrated a consensus within the union by obtaining class certification the action might have survived the motion to dismiss "because it would have then alleged an injury

find that plaintiffs have demonstrated the requisite standing to assert Counts I and II of the Complaint.

III. Personal Jurisdiction

A court cannot exercise personal jurisdiction over a defendant without a proper basis for serving the defendant with process. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). Plaintiffs seek to establish jurisdiction over Canadian defendants served in Canada under RICO's nationwide service provision, 18 U.S.C. § 1965, which allows service of process in "any judicial district of the United States."

Though § 1965 authorizes national service of process, it does not authorize international service. *Stauffacher v. Bennett*, 969 F.2d 455, 460-61 (7th Cir.), *cert.*

> common to the class of local members." *Id.* While I reserve judgment on plaintiffs' motion for class certification I note that no such divergence of interests between the union and its constituent members appears at this point. Likewise, in *Rylewicz v. Beaton Serv., Ltd.*, 888 F.2d 1175, 1179 (7th Cir. 1989), which denied stockholders standing to assert a RICO claim for violations that diminished the corporation's value, the court noted that it could not find, as the plaintiffs urged, that the "distinction between a direct and a derivative injury is blurred in this case" since "various stockholders have opposed" plaintiffs' claims. By contrast, the distinction between direct and derivative harm fades in this case. The commonality of the harm to the union members blurs the distinction between harm to the NHLPA membership and harm to the NHLPA itself, undermining defendants' argument that under no set of facts could plaintiffs' injuries prove sufficiently direct to confer standing.

denied, 506 U.S. 1034 (1992); *Soltex Polymer Corp. v. Fortex Indus., Inc.*, 590 F. Supp. 1453, 1460 (E.D.N.Y. 1984).[9] Section 1965 thus does not authorize service of the Canadian defendants in Canada.

Plaintiffs must therefore serve process and attempt to establish personal jurisdiction under state law. *See* Fed. R. Civ. P. 4; *Brink's Mat Ltd. v. Diamond*, 906 F.2d 1519, 1522-23 (11th Cir. 1990). State law requires certain minimum contacts with Pennsylvania. *See* 42 Pa.C.S. § 5322(a).[10]

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[9] *In re All Terrain Vehicles Litigation*, 1989 WL 32754 (E.D. Pa. 1989), did not permit service abroad under § 1965 but rather held only that § 1965's limitation to judicial districts of the United States did not invalidate service outside the United States that was properly effected under a state longarm statute.

[10] Though aggregate contacts with the United States may suffice under the Due Process Clause to confer jurisdiction over an alien properly served under a nationwide service of process provision, *see Max Daetwyler Corp. v. Meyer*, 762 F.2d 290, 291, 294 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985), when the nationwide service provision does not govern because it is limited to judicial districts of the United States and process was served abroad, aggregate national contacts cannot provide the basis for serving process. Plaintiffs must thus resort to state service of process provisions. Pennsylvania law permits service only when defendants have certain "minimum contact with this Commonwealth." *See* 42 Pa.C.S. § 5322(a), (b), (d). Absent this statutorily required forum-specific contact, service is not authorized, see § 5322(d), (b), and personal jurisdiction is lacking. *See Omni Capital*, 484 U.S. at 104.

Plaintiffs request and are entitled to discovery relevant to determining jurisdictional facts. *See, e.g., El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 670 (D.C. Cir. 1996). They shall be permitted to take discovery regarding the Canadian defendants' contacts with Pennsylvania and disputed communications involving consent to service of process.

IV. Forum Non Conveniens

The doctrine of forum non conveniens permits a court, in its discretion, to decline to exercise jurisdiction it possesses. Thus the doctrine "can never apply if there is absence of jurisdiction." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). I cannot yet determine whether I may exercise personal jurisdiction over many of the defendants. I will thus reserve judgment on the forum non conveniens issue. Only after determining whether the Canadian defendants will remain in the case can I accurately assess whether a Canadian forum is more appropriate.[11]

V. Particularity

Because I am not yet assured of my personal jurisdiction over the Canadian defendants I reserve judgment as to the sufficiency of the pleadings against them.

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[11] A party seeking transfer on forum non conveniens grounds must demonstrate both that there is an adequate alternate forum and that public and private interests weigh in favor of transfer. *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1225-26 (3d Cir. 1995); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43 (3d Cir. 1988). I do not reach either question at this time.

VI. Transfer

Defendants urge the Court to transfer the action to the District of Massachusetts, where a grand jury has indicted Eagleson on criminal charges, in the interests of justice and convenience pursuant to 28 U.S.C. § 1404(a). They bear the burden of justifying the transfer. *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 756 (3d Cir. 1973); *Leonardo Da Vinci's Horse, Inc. v. O'Brien*, 761 F. Supp. 1222, 1229 (E.D. Pa. 1991).

Defendants argue that the Massachusetts court's "familiarity" with the case will expedite resolution and minimize conflicts between the civil and criminal cases. They have not shown any advantages concerning access to evidence, availability of compulsory process, convenience of witnesses[12] or other factors making trial more expeditious in Massachusetts than in Pennsylvania. *See O'Brien*, 761 F. Supp. at 1229.

Though ordinarily the pendency of a criminal case in another forum would weigh in favor of transfer, in this case Eagleson has not submitted to the Massachusetts court's jurisdiction. Consequently the criminal action has not progressed since the indictment was handed down two years ago. Discovery has not been taken and the Massachusetts judge has had no apparent opportunity or reason to become familiar with the case.[13] Moreover,

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[12] Absent any argument that their testimony is material I find the Massachusetts residence of two of the plaintiffs unpersuasive. *See Plum Tree*, 488 F.2d at 756 n. 2, *O'Brien*, 761 F. Supp. at 1230.

[13] Indeed there is no assurance that the civil action if transferred would be assigned to the same Judge.

this action involves numerous defendants not under indictment in Massachusetts. I therefore find that defendants have not satisfied their burden of demonstrating that transfer to the District of Massachusetts will serve the interests of justice or convenience.

VII. Stay

Defendants seek to stay civil proceedings pending resolution of the criminal action against Eagleson. Weighing the competing interests of plaintiffs, defendants, the courts, non-parties and the public, *see In re Residential Doors Antitrust Litigation*, 900 F. Supp. 749, 756 (E.D. Pa. 1995); *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D. Pa. 1980), I find that a stay is appropriate as to all aspects of this case except the outstanding jurisdictional issues.

Though many of the civil defendants are not under criminal indictment, Eagleson is the central figure in each case and the substantive allegations overlap considerably. Were the civil action to proceed, Eagleson would face a choice between defending himself in the civil action at the risk of incriminating himself in the criminal case, or asserting his Fifth Amendment privilege at the risk impeding his defense or raising an adverse inference. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

Plaintiffs have a general interest in proceeding expeditiously with their case. The instant case does not, however, present any particular risk of further violations, destruction of evidence, or other forms of prejudice due to delay. Plaintiffs' interests are therefore outweighed by the constitutional implications of Eagleson's interest. *See*

Volmar Distrib., Inc. v. New York Post Co., 152 F.R.D. 36, 40 (S.D.N.Y. 1993).[14]

Because the other defendants are not under criminal indictment and would not face the same burdens as Eagleson in defending the civil case, I have considered staying the case only as to Eagleson. I have concluded, however, that a partial stay would not serve the Court's, the parties' or the witnesses' interests. Eagleson is a central figure in all the allegations and his testimony is critically important. Discovery taken without the benefit of his testimony would be incomplete and could require plaintiffs to repeat depositions in light of information later obtained from Eagleson. *See Volmar*, 152 F.R.D. at 41.[15] Thus I find that the benefits, if any, of allowing the rest of the case to proceed while staying the case only as to Eagleson would not outweigh the inefficiency and expense of the duplicative discovery likely to be necessitated thereby.

While the foregoing analysis applies to the substantive issues in the case it does not apply to defendants' jurisdictional challenge. Eagleson's contacts with Pennsylvania are not at issue in the criminal case. Therefore,

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[14] The fact that the criminal indictment primarily involves the Count II allegations does not obviate the need for a stay as to Count I as well. Because both Counts involve Eagleson's alleged appropriation of tournament profits they are too factually intertwined for me to find that Fifth Amendment concerns are confined to Count II.

[15] Moreover, the availability of transcripts and other evidence from the criminal trial could streamline discovery, and the outcome of the criminal case could encourage settlement. *See Volmar*, 152 F.R.D. at 41-42.

as to these jurisdictional issues I do not find that Eagleson's risk of self-incrimination outweighs plaintiffs' interest in proceeding with their civil case. I will therefore permit discovery to proceed as to Eagleson and the other Canadian defendants regarding their contacts with Pennsylvania and will otherwise stay the case.

I would, however, be abusing my discretion to stay the case indefinitely. *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982). I am cognizant that Eagleson himself is a primary cause of the delay in the criminal case and that staying the civil action until resolution of the criminal case can only increase his incentive to prolong that delay. I will therefore enter the stay without prejudice to plaintiffs' right to petition the Court to have it lifted if the delay in the criminal case persists for an undue time after the jurisdictional issues in this case are resolved or if other circumstances so warrant.

AND NOW this day of July 22, 1996 upon consideration of defendants' motions to dismiss the Complaint or to transfer or stay the action, the parties' filings related thereto and the parties' oral arguments before the Court it is hereby ORDERED as follows:

(1) Defendants' motion to dismiss the Complaint as time-barred is DENIED.

(2) Defendants' motion to dismiss the Complaint for lack of standing is DENIED.

(3) The Canadian Defendants' motion to dismiss for lack of personal jurisdiction is hereby DENIED without prejudice to renewal following the close of discovery. Plaintiffs may take discovery regarding jurisdictional facts including the Canadian Defendants'

contacts with Pennsylvania and communications alleged to indicate consent to jurisdiction. Such discovery shall be completed within ninety (90) days from the date of this Order. The parties will submit briefs on the outstanding jurisdictional issues within thirty (30) days from the date of the close of discovery.

(4) Defendants' motion to transfer the case on *forum non conveniens* grounds is DENIED without prejudice to renewal by letter application following the Court's resolution of the outstanding jurisdictional issues. Such motion may be renewed upon existing or amended pleadings as appropriate.

(5) The Canadian Defendants' motion to dismiss the Complaint for lack of particularity is hereby DENIED without prejudice to renewal by letter application following the Court's resolution of outstanding jurisdictional issues. Such motion may be renewed upon existing or amended pleadings as appropriate.

(6) Defendants' motion to transfer the case to the District of Massachusetts is DENIED.

(7) Defendants' motion to stay this action is GRANTED and this action is hereby STAYED pending disposition of the criminal indictment except as to resolution of the outstanding jurisdictional issues as specified in paragraph (3) of this Order. This stay is entered without prejudice to plaintiffs' right to petition the Court to have it lifted on grounds identified in the accompanying Memorandum.

MOTION FILED
AUG 14 1996

(11)

No. 95-1723

In The

Supreme Court of the United States

October Term 1995

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA, AND JOANNE SIRAGUSA,

Petitioners,

vs.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., AND BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHARTERED,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF

The National Association of Securities and Commercial Law Attorneys (NASCAT), by counsel and pursuant to Rules 37.1 and 37.3(b), hereby submits its Motion for Leave to File a Brief as *Amicus Curiae* in support of Petitioners. NASCAT respectfully submits that its Motion should be granted for the following reasons:

1. NASCAT is an association of law firms and attorneys who litigate cases involving antitrust, commercial, consumer, employee benefit, environmental, pension and securities fraud claims in federal and state courts. NASCAT's members frequently represent victims of corporate abuse, schemes to defraud and so-called "white collar" criminal activity. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent wrongful, fraudulent, deceptive and manipulative business practices.

2. NASCAT and its members have a profound interest in the scope and bases of civil liability sought to be imposed against wrongdoers under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. NASCAT's members have represented the victims of fraudulent schemes and so-called "white collar" crime in many significant civil RICO actions brought in recent years, including *In re American Continental Corp./ Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992); *In re Crazy Eddie Sec. Litig.*, 812 F. Supp. 338

(E.D.N.Y. 1993); and *In re ZZZZ Best Sec. Litig.*, 864 F. Supp. 960 (C.D. Cal. 1994). Because of their experience representing the victims of fraud in civil RICO actions, NASCAT's members can offer a helpful perspective to this Court in evaluating the arguments made by Petitioners and Respondents in this case, which concerns the appropriate accrual rule for the four-year statute of limitations governing civil RICO actions.

3. In addition, counsel for NASCAT in this proceeding have published numerous commentaries concerning civil RICO litigation and jurisprudence. Professor G. Robert Blakey is the author (or co-author) of numerous law review articles concerning RICO, including G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform*, 43 Vand. L. Rev. 851 (1990). NASCAT's counsel of record, Kevin P. Roddy, is the author (or co-author) of numerous law review articles concerning civil RICO litigation, and is the author of a two-volume treatise entitled *RICO in Business and Commercial Litigation* (Shepard's/McGraw-Hill, Inc. 1991 & Cum. Supp. 1996). Their forthcoming article, G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability*, which will be published in the September 1996 issue of the *American Criminal Law Review*, addresses (among other topics) the Question Presented in this case: the proper accrual rule for the four-year statute of limitations governing civil actions brought under § 1964(c) of RICO, 18 U.S.C. § 1964(c).

4. NASCAT seeks to file the attached *amicus curiae* brief because it supports reversal of the Ninth Circuit's

decision in this case. *See Grimmett v. Brown*, 75 F.3d 506 (9th Cir.), *cert. granted*, No. 95-1723, 1996 U.S. LEXIS 3909 (June 17, 1996). In the attached *amicus* brief, NASCAT advocates this Court's adoption of the "last predicate act" rule of accrual followed by the Third Circuit in civil RICO cases, as set forth in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). For the reasons stated in the attached *amicus* brief, NASCAT respectfully submits that this is the most appropriate rule of accrual and should be selected by this Court as a uniform rule governing all civil RICO actions.

5. This Court has the inherent authority to appoint an *amicus curiae*, or "friend of the court," to assist it in analyzing and deciding a case. *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 960 n.10 (M.D. Fla. 1993); *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1500 (S.D. Fla. 1991). This Court (and the lower federal courts) have long recognized the beneficial role that an *amicus curiae* such as NASCAT can play by "alert[ing] the court to the legal contentions of concerned bystanders," *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 533 (7th Cir. 1988), and contributing to the Court's understanding of the issues before it. *Harris v. Pernsley*, 820 F.2d 592, 603 (3d Cir.), *cert. denied*, 484 U.S. 947 (1987).

6. NASCAT has historically participated as *amicus curiae* in cases arising under RICO, the federal securities laws, state tort laws and the Employee Retirement Income Security Act, and NASCAT has filed *amicus curiae* briefs in this Court in numerous cases. *See, e.g., Varity*

Corp. v. Howe, No. 94-1471 (ERISA); *BMW of North America, Inc. v. Gore*, No. 94-896 (punitive damages); *Curtiss-Wright Corp. v. Schoonejongen*, No. 93-1935 (ERISA); *Plaut v. Spendthrift Farm, Inc.*, No. 93-1121 (statute of limitations); *Gustafson v. Alloyd Co.*, No. 93-404 (securities fraud); *Boca Grande Club, Inc. v. Florida Power & Light Co.*, No. 93-180 (contribution); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, No. 92-854 (securities fraud); *TXO Production Corp. v. Alliance Resources*, No. 92-479 (punitive damages); *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, No. 92-34 (contribution); *Reves v. Ernst & Young*, No. 91-886 (RICO); and *Holmes v. Securities Investor Protection Corp.*, No. 90-727 (RICO). NASCAT respectfully submits that its submission of the attached brief as *amicus curiae* will assist the Court in deciding the issues presented in this case.

7. Pursuant to Rule 37.3(b), counsel for NASCAT sought and received written consent from Petitioners' counsel to file the attached *amicus curiae* brief; however, counsel for Respondents have refused to provide their consent. Accordingly, NASCAT was compelled to file this Motion for Leave to file the attached Brief as *Amicus Curiae*.

For the reasons stated above, NASCAT respectfully submits that its Motion for Leave to File a Brief as *Amicus Curiae* should be granted.

DATED: August 14, 1996

Respectfully submitted,

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No. 95-1729

In The

Supreme Court of the United States

October Term, 1995

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA, AND JOANNE SIRAGUSA,

Petitioners,

vs.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., AND BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHARTERED,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF PETITIONERS

QUESTION PRESENTED

Does a civil action brought under § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), accrue when the victim knows or should know that she was injured – even though she does not know of the existence of a pattern of racketeering activity – or only when she knows or should know that her injury was caused by defendants and was, in fact, part of a pattern of racketeering activity?

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I. INTEREST OF AMICUS CURIAE

The interest of *amicus curiae*, the National Association of Securities and Commercial Law Attorneys (NASCAT), is set forth in the foregoing Motion.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Since this Court's decision nine years ago in *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987) (*"Malley-Duff"*), which held that a four-year limitations period borrowed from federal antitrust law governs civil actions brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968, the circuit courts have adopted several conflicting rules governing *when* civil RICO actions *accrue*. This case presents an opportunity for this Court to resolve this split in the circuits and adopt a uniform rule of accrual.

Many circuit courts have adopted the so-called "injury discovery" rule, which holds that a civil RICO claim accrues when a victim discovers (or should have discovered) his injury, even if the existence of the remaining elements of the RICO claim are unknown. A more acceptable variation, the so-called "injury and pattern discovery" rule, which has been adopted in other circuits, ameliorates the unjust impact of the "injury discovery" rule, but does not fully reflect RICO's broad remedial purposes, which are embodied in its statutory language and legislative history. For the reasons stated herein, NASCAT respectfully submits that the "last predicate act" rule, which was ably elucidated by the Third Circuit in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-33 (3d Cir. 1988) (*"Keystone"*), is the most appropriate accrual rule and should be adopted by this Court.

III. ARGUMENT

A. Given The Conflicting Rules Adopted By The Circuit Courts Following *Malley-Duff*, It Is Appropriate For This Court To Elucidate A Uniform Rule of Accrual For Civil RICO Actions

When Congress enacted RICO in 1970, as is so often the case, it failed to institute a specific limitations period for actions brought under the statute. *See Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J. dissenting) ("[f]ew areas of the law stand in greater need of firmly defined, easily applied rules"). With regard to *civil* RICO cases, the applicable limitations period remained unsettled until this Court decided *Malley-Duff*, 483 U.S. at 156, which held that a uniform four-year period, as borrowed from federal antitrust law in the Clayton Act, 15 U.S.C. §15(b), would be the applicable period for civil RICO claims. *Id.*[1] This Court, however, expressly refused to reach the question of *when* the four-year limitations period begins to accrue[2] in a civil RICO action,[3] leaving the issue for the lower federal courts to try to resolve.

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[1] *See generally* Donna A. Boswell, Comment, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. Pa. L. Rev. 1447 (1987) (discussing *Malley-Duff* in the context of federal jurisprudence on statutes of limitations); *Special Project – Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011, 1084-94 (1980) (discussion qualifications to time bars, including accrual and tolling doctrines).

[2] "Accrual" refers to the point at which a cause of action may be maintained. Black's Law Dictionary 20-21 (6th ed. 1990). The start of a limitations period and the accrual of a cause of action are terms used synonymously by many courts. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) ("Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.") (citations omitted); *see also United States v. Kubrick*, 444 U.S. 111, 122 (1979) (knowledge of injury and who injured you); *but see Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1412 (9th Cir. 1987) (in cases where fraud is alleged, the claim accrues when the plaintiff suffers injury, but the statute of limitations does not run until the claim is discovered). Federal law governs when the RICO cause of action accrues in this case. *See Cope v. Anderson*, 331 U.S. 461, 464 (1947); *Fisher v. Whiton*, 317 U.S. 217, 218 (1942).

As the court below noted, *see Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir.), *cert. granted*, No. 95-1723, 1996 U.S. LEXIS 3909 (June 17, 1996), in the wake of *Malley-Duff* the circuits have split on the question of *when* the four-year limitations period begins to run to such an extent that several differing theories of accrual have been generated. *See Granite Falls Bank v. Henrikson*, 924 F.2d 150, 152 (8th Cir. 1991) (describing a "smorgasbord of civil RICO accrual rules" from which to select the most appropriate rule).[4] While there is some common ground

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[3] In *Malley-Duff*, Justice O'Connor stated in pertinent part:

> This litigation was filed on March 20, 1981, less than four years after the earliest time *Malley-Duff*'s RICO action could have accrued – *i.e.*, the date of *Malley-Duff*'s termination on February 13, 1978. Accordingly the litigation was timely brought. Because it is clear that *Malley-Duff*'s RICO claims accrued within four years of the time the complaint was filed, we have no occasion to decide the appropriate time for accrual for a RICO claim.

483 U.S. at 156-57.

[4] For commentary on the various accrual rules and their ramifications in civil RICO litigation, *see generally* Douglas Abrams, *The Law of Civil RICO* §2.4 (Little Brown & Co. 1991 & Cum. Supp. 1996) (*"Civil RICO"*); Salgado, *The Time-Expired Civil RICO Claim and Subsequent Predicate Acts*, 68 Denver L. Rev. 445 (1991); Paul B. O'Neill, *"Mother of Mercy, Is This the Beginning of RICO?": The Proper Point of Accrual of a Private Civil*

among the circuits concerning this issue because, in the words of the Eighth Circuit, each one has "incorporated the principle of discovery into the accrual rule governing civil RICO actions in the particular circuit," *Granite Falls*, 924 F.2d at 153; *see also McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992) ("Every court that has considered an accrual rule for civil RICO has adopted some sort of discovery rule."), the circuits diverge over the "question of what the plaintiff must actually or constructively know before the limitations period will start to run." *Granite Falls*, 924 F.2d at 153. As previously pointed out by Petitioners, *see* Petition for Writ of Certiorari at 9, the differing accrual rules followed in the lower federal courts provide widely differing periods of time within which an injured person or entity may investigate and bring a civil RICO action; indeed, such differences are frequently outcome determinative, as the facts of this case demonstrate.

For the reasons stated herein, NASCAT respectfully submits that it is the appropriate time (and this is the appropriate case) for this Court to adopt a uniform rule of accrual governing civil RICO actions. *See Chardon*, 462 U.S. at 669 (Rehnquist, J., dissenting). Although a numerical majority of the circuit courts have adopted the so-called "injury discovery" and "injury and pattern discovery rules," *see* Part III.B, *infra*, given their limitations this Court should follow the "last predicate act" accrual rule announced by the Third Circuit in *Keystone*, 863 F.2d at 1130-33. *See* Part III.C-D, *infra*.

RICO Action, 65 N.Y.U.L. Rev. 172 (1990) ("*Proper Point of Accrual*"); Mary S. Humes, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399 (1990) ("*Uniform Rule of Accrual*"); Edwin Scott Hackenberg, *All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of Agency Holding Corp. v. Malley-Duff*, 48 La. L. Rev. 1411 (1988) ("*Accrual of Civil RICO Claims*").

B. While The Majority Of The Circuit Courts Have Adopted The "Injury Discovery" And "Injury And Pattern Discovery Rules," Their Limitations Weigh Against Their Adoption By This Court

The First, Second, Fourth, Fifth, Seventh, Ninth and District of Columbia Circuits employ an *injury*-based accrual rule. Under this method, as the court below explained, a civil RICO action accrues at the time plaintiff *discovered* or should have discovered his, her, or its *injury*. *See Grimmett*, 75 F.3d at 511 (" 'The limitations period [for civil RICO actions] begins to run when a plaintiff knows or should know of the injury which is the basis for the action.' ") (quoting *Stitt v. Williams*, 919 F.2d 516, 525 (9th Cir. 1990)).[5] Significantly, under the "injury discovery" rule a civil RICO plaintiff "need not discover that the injury is part of a 'pattern of racketeering' for the period to begin to run." *Grimmett*, 75 F.3d at 510 (quoting *McCool*, 972 F.2d at 1465).

The injustice of the so-called "injury discovery" rule may be illustrated by a simple hypothetical situation

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[5] *See also Rodriguez v. Banco Cent.*, 917 F.2d 664, 665 (1st Cir. 1990) (Breyer, Ch.J.) ("[T]he statute begins to run when a plaintiff discovered, or should have discovered, his injury."); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988) (same), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987) (RICO's limitations period "begins to run when a plaintiff knows or should know of the injury that underlies his cause of action."); *La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986) (same); *McCool*, 972 F.2d at 1464-65 (same); *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-90 (D.C. Cir. 1989) (same); Abrams, *Civil RICO*, §2.4, at 61 ("A civil RICO claim accrues when the plaintiff discovered or had reason to discover the proprietary injury that is the basis of the claim.") (footnotes and citations omitted).

common to civil RICO actions: Suppose plaintiff suffers an injury to his business or property in 1980 when defendant commits an illegal act that constitutes a predicate act of "racketeering activity."[6] Assume that plaintiff discovers that injury in 1984. Although injured, plaintiff has no civil RICO action at this point because there is as yet no "pattern of racketeering activity"; even under the most liberal interpretation of the pattern requirement, at least two predicate acts are necessary.[7] Assume further that plaintiff sustains another injury caused by another predicate act committed by defendant; plaintiff discovers the second injury in 1990 and then files a civil RICO action. Under the "injury discovery" accrual rule, it is arguable that plaintiff would be unable to recover for the 1984 injury, even though he sustained two injuries caused by predicate acts of racketeering occurring within ten years of each other, the baseline requirement for a civil

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[6] *See* 18 U.S.C. §1961(1) (defining "racketeering activity" to include such offenses as bribery, arson, extortion, and threats to commit any of the above, as well as other activities already criminalized elsewhere in the U.S. Code, such as mail fraud, wire fraud, interstate transportation of stolen property, embezzlement and bankruptcy fraud).

[7] *See* 18 U.S.C. §1961(5) (defining "pattern of racketeering activity"); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) ("[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.") (emphasis in original); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) ("It is the factor of *continuity plus relationship* which combines to produce a pattern. . . . 'criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' ") (emphasis in original; citation omitted).

RICO claim. *See* 18 U.S.C. §§1961(5), 1962(c) and 1964(c); *but see Grimmett*, 75 F.3d at 512 ("[A] RICO cause of action cannot accrue until all the elements exist."). Courts applying the "injury discovery" rule would hold that the 1984 discovery triggered the four-year limitations period, so plaintiff's civil RICO claim became time-barred in 1988, before he could allege a pattern of racketeering activity that included the 1990 injury. *See, e.g., State Farm Mut. Auto Ins. Co. v. Ammann*, 828 F.2d 4, 4-5 (9th Cir. 1987) (discovery of each injury triggers RICO's four-year statute of limitations beyond which plaintiff may not recover for such injury).

As a result of this possible injustice, the "injury discovery" accrual rule is subject to well-justified criticism,[8]

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[8] *See* O'Neill, *Proper Point of Accrual*, 65 N.Y.U.L. Rev. at 205-06 ("[U]nder the discovery rule it is possible that a plaintiff could discover an injury caused by a defendant's racketeering act and have the statute of limitations run on that injury prior to the time of the commission of the second predicate act necessary to perfect plaintiff's right to relief under the statute. The RICO plaintiff might have part of his cause of action barred before he ever has the opportunity to sue.") (footnote omitted); Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1410 (noting that the "injury discovery" accrual rule "may clash with the pattern requirement" because "[i]f the claim accrues after the first injury but before the plaintiff can state a pattern, plaintiff may be time barred before he can state a claim. . . . Because of this defect, the discovery rule cannot be reconciled completely with the pattern requirement of RICO and is therefore not the best accrual rule for RICO actions.") (footnote omitted); Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 Minn. L. Rev. 827, 879 (1987) ("Because a potential plaintiff has not been injured under RICO until the pattern element has been satisfied, it is inappropriate to start the limitations period before the pattern is fully developed."); Abrams, *Civil RICO*, §2.4, at 62 ("The discovery rule has encountered criticism because a civil RICO plaintiff might suffer proprietary injury (and thus might

which the court below, of course, sidestepped. *See Grimmett*, 75 F.3d at 512. Recognizing the severe limitations inherent in the "injury discovery" rule, the Third, Sixth, Eighth, Tenth and Eleventh Circuits have adopted an accrual rule that applies the general discovery rule to *both* the "pattern" element *and* the "injury" element of the civil RICO cause of action.[9] These courts find that a civil RICO action does not accrue until "the plaintiff knows, or should have known, of his injury *and that the injury is part of a pattern of racketeering activity*." *Bivens Gardens*, 906 F.2d at 1554 (emphasis added). In the further words of the Eleventh Circuit:

> We hold . . . that with respect to each independent injury to the plaintiff, a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, *both the existence and source of his injury and that the injury is part of a pattern*. . . . Because a civil RICO plaintiff must prove that his injury is part of a pattern of racketeering activity, an injured party must know, or have reason to know, that his injury is part of a pattern before he can be expected to file a civil RICO cause of action.

Id. at 1554-55 (emphasis added).[10] In the court below, Petitioners argued that the Ninth Circuit should adopt

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discover or have reason to discover that injury) well before the defendant commits sufficient predicate acts to constitute a pattern of racketeering activity.").

[9] *See, e.g., Keystone*, 863 F.2d at 1130-31; *Caproni v. Prudential Sec.*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Granite Falls*, 924 F.2d at 154; *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1553-54 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991).

[10] *See also District 65 Retirement Trust for Members of the Bureau of Wholesale Sales Representatives v. Prudential Sec.*, 925 F. Supp. 1551, 1563-64 (N.D. Ga. 1996). The *Bivens Gardens* rule has been followed in the Eighth Circuit, *see Association of Commonwealth Claimants v. Moylan*, 71 F.3d 1398, 1402 (8th Cir. 1995), the Sixth Circuit, *see Caproni*, 15 F.3d at 619-20 (under the "injury and pattern discovery" rule, the plaintiff must "discover or be in a position to discover, the existence of a pattern of racketeering activity *in addition to* the existence . . . of the injury") (emphasis added; footnote omitted); *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 240-42 (6th Cir. 1992) (civil RICO claim time-barred under either "injury discovery" rule or "injury and pattern discovery" rule), and the Tenth Circuit, *see* note 9, *supra*; *see also Wilder v. Meyer*, 779 F. Supp. 164, 168 (S.D. Fla. 1991); *Randolph County Fed. Sav. & Loan Ass'n v. Sutliffe*, 775 F. Supp. 1113, 1117-18 (S.D. Ohio 1991).

the "injury and pattern discovery" rule followed in the Sixth, Eighth, Tenth and Eleventh Circuits, and leveled several compelling criticisms at the "injury discovery" rule, *see Grimmett*, 75 F.3d at 511-12, which the court below refused to heed.[11] This case, however, presents this Court with a fresh opportunity to determine which of several competing accrual rules is the most appropriate for civil RICO actions.

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[11] The Ninth Circuit panel, per Judge Hall, refused to waver from the "injury discovery" rule, stating in pertinent part:

> We do not find Siragusa's criticisms persuasive enough to warrant abandonment of the "injury discovery" rule. Moreover, the "injury discovery" rule encourages diligence in RICO prosecutions and insures that evidence remains fresh. For these reasons, we reaffirm this Circuit's rule that a civil RICO cause of action arises when the plaintiff knows or should know that she has been injured.

75 F.3d at 512.

Muddying the rough distinction between these groups – *i.e.*, injury-based accrual versus injury- and pattern-based accrual[12] – is the fact that some courts in both groups utilize a "separate accrual" rule.[13] Under this rule, each time a plaintiff suffers an independent RICO injury, a new RICO cause of action accrues (a) when plaintiff discovers or should have discovered his injury ("injury-based" accrual), *see, e.g., Bankers Trust*, 859 F.2d at 1102; or (b) when plaintiff discovers or should have discovered

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[12] Most commentators (*see* notes 4 and 8, *supra*) have criticized these disparate rules of accrual and some have even proposed alternative theories. *See, e.g.*, O'Neill, *Proper Point of Accrual*, 65 N.Y.U.L. Rev. at 234-36 (proposing the "pattern formation rule" in which the running of the statutory period is postponed until the plaintiff first discovers or should have discovered the facts relating to two predicate acts necessary to bring a civil RICO action).

[13] In his concurrence in *State Farm Mut. Auto. Ins. Co.*, 828 F.2d at 5, then-Judge Kennedy first applied the "separate accrual" rule in the RICO context:

> The rule is that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and the other acts were committed outside the limitations period. A corollary rule is that damages may not be recovered for injuries sustained as a result of acts committed outside the limitations period.

Id. (citations omitted); *see also* Abrams, *Civil RICO*, §2.4, at 65. To date, some form of the "separate accrual" rule has been adopted by the First, Second, Seventh, Eighth, Tenth and Eleventh Circuits. *See, e.g., Rodriguez*, 917 F.2d at 666; *Bankers Trust*, 859 F.2d at 1102; *McCool*, 972 F.2d at 1464-66; *Granite Falls*, 924 F.2d at 154; *Bath*, 913 F.2d at 820; *Bivens Gardens*, 906 F.2d at 1554-55. *See also Grimmett*, 75 F.3d at 510-11 (collecting cases). The "separate accrual" rule is discussed and criticized in Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1411-13.

his injury and that the injury is part of a pattern ("injury- and pattern-based" accrual), *see, e.g., Bivens Gardens*, 906 F.2d at 1554-55. For example, in *Bankers Trust* the defendant officers of a bankrupt corporation (1) wrongfully concealed assets during a 1974-76 bankruptcy proceeding; (2) conducted harassing lawsuits in 1978-79 to prevent plaintiff from vacating the fraudulently obtained bankruptcy plan; and (3) fraudulently conveyed property in 1981. 859 F.2d at 1098-99. Plaintiffs incurred various legal fees and expenses over time, besides the loss of the debt itself. (The loss of the debt, although not time-barred, was dismissed without prejudice because its amount was speculative. *See id.* at 1105-06.) Noting that in enacting RICO, Congress had in mind the possibility of "multiple and independent [injuries] that occur over a broad span of time," the Second Circuit held that a rule permitting a new cause of action to accrue with each independent injury was "[t]he logical end result." *Id.* at 1103. Thus, the court adopted the "separate accrual" rule and found that the final two injuries were "independent" of the first. *Id.* at 1102-05.[14]

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[14] A necessary corollary of the separate accrual rule, as developed in the Second Circuit, is that plaintiff may only recover for injuries discovered or discoverable within four years of the time suit is brought. *See Bankers Trust*, 859 F.2d at 1104-05. "As long as separate and independent injuries continue to flow from the underlying RICO violations – regardless of when those violations occurred – plaintiff may wait indefinitely to sue, but may then win compensation only for injuries discovered or discoverable within the four-year 'window' before suit was filed, together, of course, with any provable future damages." *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1418 (1996) (citing *Bankers Trust*, 859 F.2d at 1103). *See also Cruden v. Bank of New York*, 957 F.2d 961, 977 (2d Cir. 1992); *In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litig.*, 850 F. Supp. 1105, 1116-19 (S.D.N.Y. 1993); Abrams, *Civil RICO*, §2.4, at 63 (discussing "separate accrual" cases).

Another version of the "separate accrual" rule was recognized by the Eleventh Circuit in *Bivens Gardens*, where defendants were accused of committing three sets of acts: (1) a wrongful takeover of a limited partnership in 1975; (2) the mismanagement and diversion of the partnership's assets from 1975 to 1981; and (3) the sale of a hotel, the partnership's primary asset, at below fair market value in 1981. 906 F.2d at 1549-51. The Eleventh Circuit held that the mismanagement and subsequent sale of the hotel were "new and independent" acts because they "[were] not included among the injuries that naturally flow from the wrongful takeover [in 1975]." *Id.* at 1551.

In subsequent cases, courts have recognized that although separate limitations periods may accrue from new injuries, the separate accrual "is limited to distinct and independent injuries."[15] In this case, the Ninth Circuit held that acts in furtherance of Respondent's scheme to conceal Petitioner's ex-husband's interest in

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[15] *Klehr v. A.O. Smith Corp.*, 875 F. Supp. 1342, 1352 (D. Minn. 1995), *aff'd*, 87 F.3d 231 (8th Cir. 1996). For example, in *Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991), plaintiffs brought their RICO actions in 1988 after defendants had ceased production of an allegedly defective furnace in 1983, thus ending the pattern of racketeering activity. Appealing the dismissal of their RICO claims, plaintiffs argued that although they first suffered injury, in the form of excessive repairs, prior to the expiration of the four-year limitations period, they suffered a "new and independent injury" in 1984 when they had to replace the furnace. This new injury, they claimed, reset the statute of limitations' clock. *Id.* at 706-07. The Third Circuit found that plaintiffs' replacement of the furnace did not constitute a new and distinct injury but, rather, a continuation of their initial injury. Thus, "the mere continuation of damages into a later period will not serve to extend the statute of limitations." *Id.* at 708.

the medical practice, which occurred after Petitioner had filed her fraud complaint in the bankruptcy court, did not result in any "new and independent" injuries so as to start the four-year limitations period running anew on the civil RICO claims. 75 F.3d at 513-14.

While the circuit courts have sought to justify the "injury discovery" accrual rule, the "injury and pattern discovery" rule and/or the "separate accrual" rule, their vagaries mean that meritorious plaintiffs' civil RICO claims may be unjustifiably time-barred, such as in the case at bar. The factual variations evident in civil RICO litigation demonstrate the need for this Court to adopt a uniform rule of accrual which takes into account the different ways in which RICO claims manifest themselves and accrue. For example, where plaintiff's civil RICO claims are grounded in fraud and plaintiff has alleged mail fraud, wire fraud and/or securities fraud as the requisite predicate acts,[16] the plaintiff has, in many cases, sustained only a "single" (albeit economically significant) injury from defendants' course of illegal conduct. In those cases (such as *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 792 F. Supp. 1424 (D. Ariz. 1992), a securities fraud/civil RICO class action brought on behalf

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[16] *See* 18 U.S.C. §1961(1) (definition of "racketeering activity") and note 6, *supra*. Section 107 of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, 758 (1995), which took effect on December 22, 1995 and amended §1964(c) of RICO to eliminate "fraud in the sale of securities" as a predicate act of racketeering activity, does not apply retroactively. *See, e.g., District 65*, 925 F. Supp. at 1566-70; *In re Prudential Sec. Ltd. Partnerships Sec. Litig.*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,253, at 95,433-37 (S.D.N.Y. 1996). *See generally* G. Robert Blakey & Kevin P. Roddy, *Securities Reform and RICO: A Lawyer's Dream*, 23 RICO L. Rptr. 802, 812-16 (June 1996).

of 23,000 defrauded investors who lost hundreds of millions of dollars when worthless subordinated debentures issued by a holding company and sold in the branches of a thrift institution controlled by now-twice-convicted felon Charles H. Keating, Jr. went into default), plaintiffs are injured only once by the alleged pattern of racketeering activity.[17] In more complex cases, such as *Prudential Securities*, ¶ 99,253, at 95,432-33, a securities fraud/civil RICO class action brought on behalf of more than 100,000 investors who lost hundreds of millions of dollars when they were fraudulently induced to invest in limited partnerships worth substantially less than represented by the general partners/promoters, the existence of multiple injuries resulting from virtually innumerable predicate acts complicates the accrual question. *Id.*[18] The four-year

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[17] A similar fact pattern was presented to the Second Circuit in *Cruden*, 957 F.2d at 977-78, a civil RICO action brought by debenture holders, where Judge Cardamone succinctly stated the applicable rule:

> Plaintiffs were injured within the meaning of §1964(c) [of RICO] when Computer and International defaulted in 1983. Hence, regardless of when other RICO *violations* may have occurred, plaintiffs' RICO *cause of action* accrued at the time of default, and the four-year statute of limitations began to run on the action at that time.

Id. (emphasis in original). As the Third Circuit recognized in *Keystone*, 863 F.2d at 1133, "[t]he [injury discovery accrual] rule is an effective rule where the facts indicate that there was one victim and each element and all predicate acts of a RICO violation were present at the same time." That fact pattern, however, is not typical of sophisticated schemes to defraud.

[18] In *Prudential Securities*, plaintiffs and the members of the class invested in six limited partnerships formed between 1985 and 1991. Applying the discovery rule followed in the Second Circuit, *see Bankers Trust*, 859 F.2d at 1103, and note 14, *supra*,

period begins to run on each of the injuries when that injury is discovered, but the application of the "injury discovery" rule of accrual to the multiple injury case results in a divisible cause of action, making it likely that a plaintiff's meritorious claim may be partially barred by the statute of limitations when she has suffered multiple injuries arising from multiple predicate acts extending over a period of time.[19]

Senior Judge Pollack analyzed the accrual of the investors' civil RICO claims:

> The statute of limitations did not begin to run on the date that investors received prospectuses in the limited partnerships, but at the date investors were in possession of sufficient information to suggest the probability of fraud. This did not occur until, at earliest, October, 1990, when capital losses were first suffered as a result of the sale of Polaris aircraft. Indeed, the record currently before the Court contains no indication that investors even learned of these capital losses until January of 1992, when the format of Prudential's monthly statements was altered so that the value of investments was no longer recorded at par. Thus, it cannot be determined at this stage of the case as a matter of law that investors in any of the Polaris limited partnerships were on notice of their injuries at a point four years prior to the filing of this suit on June 8, 1994.

¶ 99,253, at 95,433.

[19] As one commentator has criticized the "separate accrual" rule:

> [C]ourts adopting the separate accrual discovery rule seem to have overlooked the implications of this rule for plaintiff's remedy. Under the separate accrual discovery rule, plaintiff may only recover damages for those acts that took place within the four years before he filed his claim. This corollary for damages effectively diminishes any advantages derived from

Both the "injury discovery" rule and the "injury and pattern discovery" rule lead invariably to the dismissal of meritorious civil RICO claims. Neither accrual rule – even when tempered by the "separate accrual" jurisprudence developed in the Second Circuit – is (or can be) easily tailored to RICO's statutory language or the public policy underlying the statute. NASCAT respectfully submits that the uniform rule of accrual to be adopted by this Court must match RICO's statutory language, legislative purpose, and the elements of civil RICO actions that have been repeatedly recognized by this Court and the lower federal courts. As set forth below, the only accrual rule that properly fits those parameters is the "last predicate act" accrual rule followed in the Third Circuit. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1983) (five different incidents alleged in "pattern or practice" in violation of Fair Housing Act; only first four incidents involved plaintiff Coleman, but the limitations period for "continuing violations" ran from the *last* incident; noting

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> allowing the plaintiff time to discovery his injury: The damages corollary put forth in the concurrence subtracts the time allowed to discover the action from the four year statute of limitations.
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> If the last act occurred in 1982, and the injury not discovered until 1984, plaintiff does not have four years from the discovery of the injury in which to file a claim; if he waits until 1988, he will be barred, as no injuries occurred after 1982. If he is to recover damages, he has only two years from the time of discovery of the injury in which to bring his claim.

Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1412 and n.85; *see also* Hackenberg, *Accrual of Civil RICO Claims*, 48 La. L. Rev. at 1414 (same).

that "wooden application" of statute "ignores the continuing nature of the alleged violation, [and] only undermines the broad remedial intent of Congress embodied in the Act") (citations omitted).

C. This Court Should Adopt The "Last Predicate Act" Accrual Rule Followed In The Third Circuit

The Third Circuit was the first federal appeals court to depart from the injury-based accrual civil RICO rules and apply discovery principles to the *pattern of racketeering activity* element of a RICO cause of action.[20] The "last predicate act" accrual rule employed in the Third Circuit, as announced in *Keystone*, 863 F.2d at 1130-31, states that

> the limitations period for a civil RICO claim runs from the date the plaintiff knew or should

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[20] RICO renders criminally and civilly liable "any person" who uses or invests income derived "from a pattern of racketeering activity" to acquire an interest in or to operate an enterprise engaged in interstate commerce, 18 U.S.C. §1962(a); who acquires or maintains an interest in or control of such an enterprise "through a pattern of racketeering activity," §1962(b); who, being employed by or associated with such an enterprise, conducts or participates in the conduct of its affairs "through a pattern of racketeering activity," §1962(c); or, finally, who conspires to violate the first three subsections of §1962, §1962(d). *See H.J., Inc.*, 492 U.S. at 232-33. Thus, a violation of Section 1962(c) "requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. . . . In addition, the plaintiff only has standing if, and only can recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima*, 473 U.S. at 496; *see also NOW v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 803-04 (1994). While "pattern" is usually the key element, other elements (*i.e.*, investment or use) may be crucial in certain situations. *See* 18 U.S.C. §1962(a); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1165 (3d Cir. 1989) (elements of §1962(a) claim).

> have known that the elements of the civil RICO cause of action existed *unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern. If the complaint was filed within four years of the last injury or the last predicate act, the plaintiff may recover for injuries caused by the other predicate acts which occurred outside an earlier limitations period but which are part of the same "pattern."*

Id. (emphasis added). In *Keystone*, plaintiff alleged an ongoing pattern of racketeering activity that continued at least until September 1983, when an act of mail fraud was committed for which defendants were criminally convicted and sentenced in 1986. Plaintiff filed its RICO claim one month later, in July 1986. *Id.* at 1127. Reversing the district court's decision (which had ruled the claim untimely under a so-called "last injury discovery" rule), the Third Circuit held that plaintiff's RICO claim was timely filed under the "last predicate act" accrual rule. In reaching this conclusion, the court (per Judge Mansmann) carefully examined RICO's express purpose, statutory language and legislative history, as well as the elements and injury requirement of a civil RICO action. *Id.* at 1127-33.[21] *See also Glessner*, 952 F.2d at 706-07 (explicating

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[21] In *Keystone*, plaintiff was not injured by *every* predicate act that constituted the pattern of racketeering activity alleged in the complaint. Nevertheless, for purposes of RICO claim accrual, the Third Circuit held that plaintiff's RICO claim was not time-barred because the last predicate act, which did not injure plaintiff, was part of the *pattern* that injured plaintiff and

Keystone rule); *Gurfein v. Sovereign Group*, 826 F. Supp. 890, 909 (E.D. Pa. 1993) (same).[22] In reaching this conclusion, the Third Circuit recognized that "the essential problem" with the so-called "injury-based" civil RICO accrual rules

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fell within the limitations period. 863 F.2d at 1130. Likewise, for purposes of RICO standing, this Court (and the lower federal courts) have found that a plaintiff need not be injured by every predicate act. *See Sedima*, 473 U.S. at 495; *Deppe v. Tripp*, 863 F.2d 1356, 1366 (7th Cir. 1988); *Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987); *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 810 (7th Cir. 1987); *Panna v. Firstrust Sav. Bank*, 760 F. Supp. 432, 437 & n.6 (D.N.J. 1991).

[22] Although *Keystone*'s "last predicate act" accrual rule appears more liberal than the injury-based or injury- and pattern-based accrual rules followed in other circuits, both the Third Circuit and district courts therein have not hesitated to dismiss civil RICO claims that were not timely brought. *See, e.g., Arab African Int'l Bank v. Epstein*, 10 F.3d 168, 174-75 (3d Cir. 1993) (rejecting proposed RICO amendment to complaint as untimely); *Davis v. Grusemeyer*, 996 F.2d 617, 622-27 (3d Cir. 1993) (RICO claims were untimely notwithstanding defendants' alleged fraudulent concealment of predicate acts); *Glessner*, 952 F.2d at 708 (plaintiffs' alleged "further injury" was not a "new and distinct injury from the initial injury"); *Fineberg v. Credit Int'l Bancshares*, 857 F. Supp. 338, 349 (D. Del. 1994) (predicate acts that allegedly prolonged limitations period were not "related to" and in "continuity with" pattern of racketeering activity alleged by plaintiff); *Owens v. Wade*, 789 F. Supp. 168, 172-75 (E.D. Pa. 1992) (same); *Korman v. Trusthouse Forte PLC*, 786 F. Supp. 458, 462-66 (E.D. Pa. 1992) (same); *Panna v. Firstrust Sav. Bank*, 749 F. Supp. 1372, 1377-78 (D.N.J. 1990) (applying *Keystone* and finding civil RICO claims time-barred), *vacated on reconsideration*, 760 F. Supp. 432, 437-38 (D.N.J. 1991) (applying *Keystone* and finding RICO claims timely); *Anderson v. Consol-Pennsylvania Coal Co.*, 740 F. Supp. 1126, 1130-31 (W.D. Pa. 1990) (allegations of fraudulent concealment were insufficient to defeat defendants' claim that plaintiffs had "actual notice of their claims" more than four years before filing suit), *aff'd*, 945 F.2d 394 (3d Cir. 1991), *cert. denied*, 502 U.S. 1075 (1992).

> lies in the fact that RICO is a crime of association, which is violated, *inter alia*, by "any person . . . associated with any enterprise . . . the activities of which affect . . . commerce, conduct[ing] . . . [the] enterprise's affairs through a pattern of racketeering." 18 U.S.C. §1962(c). Therefore the discovery rule must apply to the pattern element as well as the injury element. If the plaintiff does not discover until, for example, five years after the first injury to that plaintiff, that the injury or injuries were part of a pattern of racketeering, then that plaintiff could not bring a successful civil RICO action using the last injury discovery rule. Thus, the last injury discovery rule would not effectively fulfill the purpose of the statute where predicate acts which are part of the same "pattern" and which do not injure the plaintiff occur after the last injury to the plaintiff.

843 F.2d at 1129-30. *See also Greenberg v. Tomlin*, 816 F. Supp. 1039, 1051 (E.D. Pa. 1993) (plaintiff's RICO limitations period "must be measured from the time it knew or should have known of the pattern of racketeering activity" because if the plaintiff's "knowledge of injury arises solely from a single predicate act," it will have "discovered the injury but not the pattern").

Recognizing that "[t]he primary source of RICO's unique character is its pattern requirement," *Granite Falls*, 924 F.2d at 153,[23] three sister circuits have followed *Keystone* in applying discovery principles to *both* the injury

[23] In *Malley-Duff*, 483 U.S. at 154, this Court made it clear that "the heart of any RICO complaint is the allegation of a *pattern* of racketeering." (Emphasis in original). In *Sedima*, 473 U.S. at 497, this Court clarified the fact that "the essence of the violation is the commission of those [predicate] acts in connection with the conduct of an enterprise." *See also Keystone*, 863 F.2d at 1133 ("Given the Supreme Court's emphasis on the pattern element [in *Malley-Duff* and *Sedima*] as the core of the violation, the [injury] discovery rule's focus on injury is misplaced.").

and pattern elements for accrual purposes. *See id.* at 154 (Eighth Circuit); *Bath*, 913 F.2d at 820 (Tenth Circuit); *Bivens Gardens*, 906 F.2d at 1553-54 (Eleventh Circuit). None of these courts, however, adopted the "last predicate act" discovery element of the *Keystone* accrual rule. In *Bivens Gardens*, the Eleventh Circuit distinguished *Keystone* factually and incorporated a limiting "separate accrual" exception to its rule. 906 F.2d at 1554-55. In *Granite Falls*, the Eighth Circuit embraced the *Bivens Gardens* "separate accrual" rule, stating that "the *Bivens Gardens* rule better reflects the underlying policy of a statute of limitations requiring diligence on the part of the plaintiff than does the seemingly more open-ended rule fashioned by the Third Circuit in *Keystone*." 924 F.2d at 154. In *Bath*, the Tenth Circuit adopted the *Bivens Gardens* rule without commenting on the *Keystone* rule. 913 F.2d at 820.[24]

The unique nature of a civil RICO cause of action, which requires allegation and proof of injuries caused by a pattern of racketeering activity, *see* 18 U.S.C. §1962(a), (b), (c) and (d) and notes 7 and 20, *supra*, at the very least mandates this Court's adoption of the injury- and pattern-based accrual rule followed in the Third, Sixth,

[24] District courts in several circuits have adopted all or part of the *Keystone* "last predicate act" accrual rule. *See, e.g., Crowe v. Smith*, 856 F. Supp. 1178, 1184-85 (W.D. La. 1994) (following *Keystone*); *Coal-Mac, Inc. v. JRM Coal Co.*, 743 F. Supp. 499, 501 (E.D. Ky. 1990) (approving of *Keystone* insofar as it held that a civil RICO claim accrues when the plaintiff knows or should know of the existence of all elements of the claim); *Indianapolis Hotel Investors, Ltd. v. Aircoa Equity Interests, Inc.*, 733 F. Supp. 1406, 1408-10 (D. Colo. 1990) (same).

Eighth, Tenth and Eleventh Circuits (*see* notes 9-10, *supra*), and, NASCAT respectfully submits, the "last predicate act" rule elucidated by the Third Circuit in *Keystone*, 859 F.2d at 1130-31.[25]

D. RICO's Express Purpose, Statutory Language And Legislative History Mandate Adoption Of The "Last Predicate Act" Accrual Rule

Any accrual rule that this Court recognizes for civil RICO cases must be reconciled with the statute's definitional section, which provides that a "pattern of racketeering activity" requires "at least two acts of racketeering activity . . . *the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.*" 18 U.S.C. §1961(5) (emphasis added). *See H.J., Inc.*, 492 U.S. at 237 (observing that §1961(5) "places an outer limit on the concept of a pattern of racketeering activity that is broad indeed"). Remarking on this statutory provision, in *Keystone* the Third Circuit stated that "the accrual rule we fashion must take the specific language of the statute into account." 863 F.2d at 1132. As a result, in the words of Judge Mansmann:

> [T]here is inherent in the statute a ten year limit on the point at which the last predicate act for purposes of accrual may occur. Congress in enacting the ten year limit must have envisioned causes of action which would involve patterns of racketeering extending over that period of time. It would be inconsistent with this breadth of definition for us to state that we will look to the past ten years to see if a civil RICO claim exists but if we find ten years of racketeering activity, all related and all perpetrated by the same defendants, we will provide a remedy only to those who were victimized within the past four years. To do so would encroach upon and limit a legislatively-enacted scheme to provide recovery for racketeering injuries. *See* 18 U.S.C. §1961(5), 1964(c).

Id. at 1132-33 (footnote omitted).[26] In *Keystone*, the Third Circuit correctly concluded that §1961(5) of RICO,

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[25] Bolstering the determination that the *Keystone* last predicate act discovery rule is the appropriate civil RICO accrual rule is Congress' dictate that RICO "shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act, Pub. L. No. 91-452, §904(a), 84 Stat. 947 (1970) (codified at 18 U.S.C. §1961 note). Moreover, this Court made clear in *Sedima* that this dictate of Congress, coupled with "Congress' self-consciously expansive language and overall approach" mandate that "RICO is to be read broadly." 473 U.S. at 498.

[26] In *H.J., Inc.*, 492 U.S. at 242, this Court posited a hypothetical illustration of a RICO "pattern of racketeering activity" involving multiple victims, stating in pertinent part:

> Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity.

Id. Given "the federal interest in providing relief to those who are injured by a course of continuous and related conduct, it would be incongruous to bar, on statute of limitations grounds, recovery for predicate acts taking place outside the limitations period and permitting recovery only for those within the limitations period." *County of Cook v. Berger*, 648 F. Supp. 4336, 435 (N.D. Ill. 1986). In that case, the district court determined that since "it is the continuing nature of the violation that is the very essence of a RICO claim," *id.* at 435 n.1, the statute of

coupled with the fact that "[i]t is the continuing nature of the violation which distinguishes a RICO claim from claims arising simply from a predicate act . . . require[d] the ["last predicate act" discovery] rule [it] announce[d]." *Id.* at 1131.

Of the several characterizations of the civil RICO claim that have been made,[27] the most applicable is that of RICO as a *continuing* violation. In *Keystone*, 863 F.2d at

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limitations would run from the "last overt act" committed as part of the pattern, and Judge Kocoras rejected defendant's contention that the statute of limitations should run from the time when the County of Cook knew, or should have known, of its injury.

[27] In the words of one commentator:

> A court faced with determining an appropriate rule of accrual would first "characterize" the claim. The first step in the analysis should consider whether the RICO claim is characterized best as (1) an action to recover for a continuing violation, or (2) an action to recover for harms caused by particular predicate acts, many of which are kept secret from the plaintiff at the time of injury. If RICO is primarily an action to recover for a continuing violation, then the claim should not accrue until the plaintiff can allege a pattern. But if compensating injury was the main concern of the RICO drafters, then the claim should accrue upon injury or when plaintiff becomes aware of such injury.

Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1405 (footnotes omitted). "Neither characterization is entirely satisfactory" because "[t]he pattern requirement suggests the RICO action is similar to a continuing violation, but the nature of the predicate acts suggests that RICO is similar to an action to recover for fraud." *Id.* Indeed, in *Malley-Duff*, 483 U.S. at 152, this Court held that the predicate acts that establish racketeering activity under RICO are "far-ranging and cannot be reduced to a single generic characterization."

1131, the Third Circuit relied in part on the district court's decision in *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978), where Judge Lasker, when examining a criminal RICO violation, explained:

> *[RICO] provides an example of a continuing offense for purposes of computing the time at which the statute of limitations begins to run.* The "nature of the crime . . . is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie v. United States*, 397 U.S. 112, 115 (1970). The language of [RICO], which makes a pattern of conduct the essence of the crime, "clearly contemplates a prolonged course of conduct." *Id.* at 120. Like the statute of limitations for conspiracies, which runs from the date of the last overt act, *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957), the statute of limitations for violations of [RICO] runs from the date of the last alleged act of racketeering activity.

432 F. Supp. at 59 (emphasis added; parallel citations omitted). In criminal RICO cases brought under §1962(c), the statute of limitations begins to run from the date of the last predicate act of racketeering activity, *see, e.g., United States v. Torres Lopez*, 851 F.2d 520, 524-25 (1st Cir. 1988), *cert. denied*, 489 U.S. 1021 (1989); on the other hand, in prosecutions under §1962(a), the statute begins to run on the last date of use or investment of income derived from a pattern of racketeering activity, rather than on the date of the last predicate act of racketeering activity, *see United States v. Vogt*, 910 F.2d 1184, 1196-97 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991). In *Keystone*, the Third Circuit stated that "[a]n interesting analogy to the ["last predicate act"] rule which we announce is the accrual rule in RICO conspiracy cases," noting that "in §1962(d) conspiracy cases, no overt act need be proven." 863 F.2d

at 1132 (citations omitted). Therefore, "the statute of limitations in conspiracy cases where no overt act need be proven, such as a RICO conspiracy, does not run from commission of the last overt act; the conspiracy may be deemed to continue as long as its purposes have neither been abandoned nor fully accomplished." *Id.*[28]

With the exception of the Third Circuit in *Keystone*, 863 F.2d at 1129-30, and the Eighth Circuit in *Granite Falls*, 924 F.2d at 154, none of the circuit courts addressing the accrual issue have reconciled their respective accrual rules with the express language of §1961(5) of RICO. In *Granite Falls*, the Eighth Circuit reasoned that

> [a] violation of [§]1962 results not merely from a single act of racketeering activity but from a pattern of racketeering activity, which by definition requires at least two predicate acts occurring within a ten year period. In selecting a term of ten years within which predicate acts could occur to establish the pattern requirement, Congress must have contemplated recovery for remote acts and even for remote injuries.

924 F.2d at 154. Yet, in the next paragraph, the court rejected the "seemingly more open-ended" *Keystone* accrual rule and adopted the rule of "separate accrual" elucidated by the Eleventh Circuit in *Bivens Gardens*. *Id.*

In *Rodriguez*, the First Circuit briefly addressed §1961(5) of RICO, noting that the *Keystone* accrual rule, when applied in conjunction with §1961(5), could potentially allow an injured RICO plaintiff fourteen years to bring suit. 917 F.2d at 664. The First Circuit found this "difficult to reconcile" with this Court's "determination that 'there is a need for a uniform statute of limitations for civil RICO' lest 'the memories of witnesses . . . fade[] or evidence [be] . . . lost." *Id.* at 667 (quoting *Malley-Duff*, 483 U.S. at 156). NASCAT respectfully submits that the *Rodriguez* court misapprehended this Court's decision in *Malley-Duff* for several reasons. First, in *Rodriguez* the First Circuit voiced concern over loss of evidence and witnesses' memories in response to Justice Scalia's position in his dissent in *Malley-Duff* that *no* statute of limitations should apply if state codes fail to furnish an appropriate limitations period. 483 U.S. at 170 (Scalia, J., dissenting), not in reference to the need for a uniform statute of limitations. *Id.* at 155-56. Second, in *Malley-Duff* this Court answered the need for a uniform statute of limitations for civil RICO by establishing a four-year limitations period; however, as noted above (*see* note 3, *supra*), this Court expressly reserved the limitations issue, thereby emphasizing the importance of separating these issues. *Id.* at 156-57. Additionally, the First Circuit's apparent concern in *Rodriguez*, 917 F.2d at 667, that a plaintiff might have fourteen years in which to sue under RICO after defendants committed their first predicate criminal act against him neglects to consider the fact that

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[28] As Judge Mansmann continued the analogy:

> The Supreme Court has determined that a conspiracy *requiring* an overt act is deemed complete for statute of limitations purposes at the time of completion of the last overt act. The period of limitations in conspiracy cases requiring an overt act is tolled by each overt act done pursuant to the agreement. . . .
>
> By analogy the last predicate act of a pattern of racketeering activity is an appropriate place for civil RICO causes of action to accrue. As the court in *County of Cook* stated, "[t]he principles of conspiracy law ought clearly to apply, and so long as any of the predicate acts occur within the limitations period, a defendant should have to answer for all of his related and continual acts of harm." 648 F. Supp. at 435.

Keystone, 863 F.2d at 1132 (emphasis in original; citations omitted).

this right to sue only extends if the defendants *continue* to commit criminal acts against him.

In *Rodriguez*, the First Circuit concluded its criticism of the breadth deliberately accorded by §1961(5) of RICO by stating that "[i]n any event, we do not know why a knowledgeable plaintiff should have fourteen, rather than four years to bring suit." 917 F.2d at 667. However, "this defect – if defect it is – is inherent in the statute as written, and its correction must lie with Congress." *Sedima*, 473 U.S. at 499; *see also United States v. Thomas*, 991 F.2d 206, 215 (5th Cir.), *cert. denied*, 510 U.S. 1014 (1993) ("Actual or potential aberrant results, however, do not excuse reading (or writing) anything into or out of a statute that Congress has so consciously adopted."). Moreover, the First Circuit's assertion ignores the fact that until the second predicate act is committed – a time which might be *years* after the first predicate act is committed – plaintiff cannot allege a pattern of racketeering activity and, under this Court's (and the lower federal courts') formulation of the applicable elements, no viable civil RICO claim exists. *See H.J., Inc.*, 492 U.S. at 239; *Grimmett*, 75 F.3d at 512; *McCool*, 972 F.2d at 1465 (a RICO cause of action cannot accrue until all of the elements exist).

NASCAT respectfully submits that to the extent the circuit courts other than the Third Circuit have discussed and analyzed the "last predicate act" rule announced in *Keystone*, their rejection of that rule is unconvincing and should not preclude this Court from giving the Third Circuit's extensive discussion of the issue, 863 F.2d at 1127-35, its careful consideration.[29]

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[29] As noted above (*see* note 8, *supra*), commentators have uniformly criticized the "injury discovery" rule followed by the

IV. CONCLUSION

Given RICO's statutory language, the unique nature of the civil RICO cause of action and the elements required to assert a claim, adoption of the injury- and pattern-based accrual rule followed in the Third, Sixth, Eighth, Tenth and Eleventh Circuits, supplemented by the "last predicate act" discovery rule elucidated by the Third Circuit in *Keystone*, 863 F.2d at 1130-33, is mandated

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court below; however, commentators have recognized the validity of the *Keystone* accrual rule:

> [T]he last predicate act discovery rule adopted by the Third Circuit seems the most sensible rule for RICO accrual . . . By running the statute of limitations from the discovery of the last predicate act of the defendant, and by allowing recovery for the entire pattern of injurious acts, the last predicate act discovery rule recognizes the competing characterizations of RICO as an action to recover for a continuing violation and as an action to recover for injury caused by fraud. This method of accrual also maintains a balance of plaintiffs' and defendants' rights, as it limits recovery to those acts falling within the meaning of "pattern," which by definition cannot occur more than ten years before the last predicate act. . . .
>
> Because it accounts for the two competing characterizations of RICO while maintaining a balance between plaintiffs' and defendants' rights, the last predicate act discovery rule provides the best solution to the complex problem of determining when a RICO cause of action accrues.

Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1418.

in this case. For the reasons stated herein, the decision of the court below should be reversed.

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